





DUTIES
OF
SHERIFFS AND CONSTABLES,

PARTICULARLY UNDER THE PRACTICE IN CALIFORNIA
AND THE PACIFIC STATES AND TERRITORIES.

WITH
PRACTICAL FORMS FOR OFFICIAL USE.

BY
W. S. HARLOW.

(SECOND EDITION.)

REVISED AND EDITED BY
FRED L. BUTTON.

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PREFACE TO THE FIRST EDITION.

IN the preparation of this volume the author has aimed to furnish, as a guide to sheriffs and constables, the laws of the State of California relating to their official duties, with such interpretations of those laws as have been made by the Supreme Court of California, together with such observations and suggestions concerning the duties of officers as the writer has stored up in an experience of nearly ten years of uninterrupted service in the sheriff's office in this State.

W. S. HARLOW.

Oakland, Cal., Dec. 1, 1884.

PREFACE TO THE SECOND EDITION.

THE first edition of this work was particularly adapted to the practice in California, the references being to the codes and decisions of that State only. In the present edition, while the provisions of the California law have been retained as a basis, the scope of the work has been extended by the addition of references to, and in some cases quotations from, the corresponding laws of the other Pacific States and Territories, which it is felt will add greatly to the usefulness of the work. New chapters have been added, covering the subjects of "Exemptions," "Fixtures," and "Fraudulent Transfers." The text has been rewritten, and largely amplified on nearly every subject treated, and the whole work has been rearranged. The number of sections has been almost doubled, the additions being taken up, to a great extent, by recent decisions and by code provisions not incorporated in the former edition.

While the result of another ten years' active experience of the author in the sheriff's office has been given to this work, my aim, in the present revision, has been to make it not only a valuable one for the sheriff and constable, but also for the practicing attorney, as to all matters with which these officers have to deal.

FRED L. BUTTON,

Oakland, Cal., Jan. 1, 1895.

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CHAPTER I.

ORIGIN AND GENERAL DUTIES.

- § 1. Origin of the Office.
- § 2. Duties at Common Law.
- § 3. Duties in the United States.

§ 1. **Origin of the Office.**—The office of sheriff is one of great antiquity, one of the most ancient of all those existing under our form of government. The word "sheriff" has its origin in two Saxon words,—*scir*, denoting shire or county, and *gerefa*, reeve or bailiff. When the British Kingdom was first subdivided into counties or shires, the custody of each shire is said to have been committed to an earl, whose deputy was known in Latin as *vice-comes*. When the earl, by reason of other high employments, became relieved of all active duty as to the affairs of the county, his labor was laid on the sheriff, who became the representative of the king, and was the "first man of the county," superior in rank to any nobleman within its limits, during his term of office. (1 Blackstone, pp. 339, 343.) Originally the sheriff's duties were necessarily both ministerial and judicial, but in later years, by relegation of the judicial functions to the various courts, his essential and appropriate duties have been as "keeper of the king's peace, ministerial officer of the superior courts and king's bailiff," although he has still continued to exercise, to some extent and in cer-

tain cases, the powers of a judge. In Scotland the sheriff is still properly a judge, but with limited ministerial powers, and in London he holds what is known as the Sheriff's High Court, having cognizance of certain personal actions.

§ 2. **Duties at Common Law.**—The sheriff is the chief executive officer of the county. At common law it was his duty to execute all process that issues from its courts, carrying into effect their judgments within his own county, except where he is a party, in which case the coroner acts in his stead. It is also his duty to take charge of all prisoners pending trial, and to execute the sentence of the court, to take charge of the county jail and protect it against all rioters, and to seize and take charge of all escheats, wrecks, estrays, and the like. He is the chief conservator of the public peace, and it is his duty not only to preserve the peace, but to apprehend and commit to prison all persons who break the peace or attempt to do so, and also to pursue and arrest criminals and escapes, calling the *posse comitatus*, if necessary in the execution of these or any of his duties. At common law he also possessed extensive judicial functions, in summoning sheriff's juries and holding courts of inquiry to estimate damages or determine ownership; but this class of powers is, in this country, greatly limited, or entirely done away with, by the various statutory provisions prescribing his powers and duties. His jurisdiction is generally bounded by his own county, but he may pursue escapes and perform mere ministerial acts out of the county. (*Bouvier's Law Dictionary*, Title "Sheriffs," *Am. and Eng. Encyc. Law*, vol. 22, p. 525.)

§ 3. **Duties in the United States.**—In our country the duties of the sheriff are, in most States, prescribed by code or statutory provisions, but are substantially the same as at common law. Some of the common law powers and duties have been curtailed or entirely taken away, such as judicial powers and duties as to estrays, and other special powers and duties have been added, such as receiverships in insolvency cases, and the like.

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§ 4. **Who Are Eligible.**—No person is eligible to office who, at the time of his election, is not of the age of twenty-one years, a citizen of the State and an elector of the county. (*California. Sec. 56 Co. Govt. Bill; Statutes 1893, p. 366.*) Compare:

Arizona. Sec. 454 Revised Statutes, 1887.

Colorado. Sec. 10, Art. XIV Constitution.

Idaho. Sec. 1810 Revised Statutes, 1887.

Nevada. Sec. 1637 General Statutes, 1885.

Oregon. Sec. 2389 Hill's Codes, 1892.

Utah. Secs. 280-1, p. 329 I Comp. Laws, 1888.

Washington. Sec. 344, I Hill's Codes, 1891.

§ 5. **Election and Term of Office.**—The sheriff is elected at the general State election in November, for a term of four years, and takes office at twelve

o'clock meridian on the first Monday after the first day of January next succeeding his election. He holds his office until his successor is elected and qualified. (*California. Sec. 60, Co. Govt. Bill; Statutes 1893, p. 367.*)

Compare:

Arizona. Sec. 467 Revised Statutes, 1887.

Colorado. Sec. 8, Art. XIV, Constitution.

Idaho. Sec. 1814 Revised Statutes, 1887.

Montana. Sec. 849, p. 872, Compiled Statutes, 1887.

Nevada. Secs. 1636, 1644, 1652, 2119, General Statutes, 1885.

Oregon. Secs. 2388, 2390, 2396 Hill's Codes, 1892; Art. VII, Sec. 16, Constitution.

Utah. Sec. 103, p. 279, 1 Comp. Laws, 1888.

Washington. Secs. 168, 324 1 Hill's Codes, 1891.

§ 6. **Oath of Office.**—Before entering on the duties of his office, the sheriff must take and subscribe the following oath: "I do swear [or affirm] that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of sheriff according to the best of my ability." This oath may be taken before any officer authorized to administer oaths, and must be subscribed and filed with the county clerk within ten days after he has notice of his election, or before the expiration of fifteen days from the commencement of his term of office, when no such notice has been given. (*California. Secs. 704, 707, 708, and 709 Pol. Code.*) Compare:

Arizona. Secs. 483, 3067-70 Rev. Stats., 1887.

Colorado. Mills' Ann. Stats., 1891, Sec. 931; Vol. I, p. 336, Secs. 468-9.

Idaho. Secs. 350, 353-4 Revised Statutes, 1887.

Montana. Sec. 1067, p. 939, *Comp. Stats.*, 1887.

Nevada. Secs. 2120, 1661-2, 1737, 1657-8 *General Statutes*, 1885.

Oregon. Sec. 2390 *Hill's Codes*, 1892.

Utah. Sec. 24, p. 122; Sec. 104, p. 279, *1 Comp. Laws*, 1888.

§ 7. **Official Bond.**—The sheriff must give an official bond in the amount prescribed by the Board of Supervisors, which bond must be approved in writing by the judge, or judges, if there be more than one, of the Superior Court, recorded in the office of the county recorder and filed in the office of the county clerk within the time prescribed for filing his oath of office. The condition of the bond must be that the principal will well, truly and faithfully perform all official duties then required of him by law, and also all such additional duties as may be imposed on him by any law of the State of California. Such bond must be signed by the principal and at least two sureties. All persons offered as sureties shall be examined, on oath, touching their qualifications, and no person can be admitted as surety on any such bond unless he is a resident and freeholder or householder within the State, and is worth in real or personal property, or both, situate in this State, the amount of his undertaking, over and above all sums for which he is already liable, exclusive of property exempt from execution and forced sale. Neither the county clerk, tax collector, treasurer, recorder, auditor, assessor, district attorney, or a member of the Board of Supervisors of the same county, shall be accepted as a surety. (*California.* Sec. 69 *Co. Govt. Bill, Stats.* 1893, p. 368; also Secs. 947, 952, 944, 955 *Pol. Code.*) Compare:

- Arizona.* Secs. 479-483, 3072-81, *Rev. Stats.*, 1887.
Colorado. Secs. 848-9, 931 *Mills' Ann. Stats.*, 1891.
Idaho. Secs. 390, 392-8, 1828 *Rev. Stats.*, 1887.
Montana. Secs. 849-850, p. 872, *Comp. Stats.*, 1887.
Nevada. Secs. 2120, 1657, 1738-49, 1755 *General Statutes*, 1885.
Oregon. Secs. 2392, 2395 *Hill's Codes*, 1892.
Utah. Sec. 104, p. 279; Secs. 271-2, pp. 327-8, *I Compiled Laws*, 1888.
Washington. Secs. 168, 171, 2900-11 *I Hill's Codes*, 1891.

§ 8. **Special Liability in Bond.**—"Whenever, except in criminal prosecutions, any special penalty, forfeiture, or liability is imposed on any officer for non-performance or malperformance of official duties, the liability therefor attaches to the official bond of such officer, and to the principal and sureties thereon." (*California.* Sec. 64 *Co. Govt. Bill, Stats.* 1893, p. 367.)
Idaho. Sec. 1823 *Revised Statutes*, 1887.

§ 9. **Bond of Ex-Officio Officer.**—When, by statute, the sheriff is *ex-officio* tax collector, he must give a separate bond for each office. (*People vs. Burkhardt*, 76 *Cal.* 606.)

§ 10. **Assuming Office without Having Qualified.**—"Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor." (*California.* Sec. 65 *Penal Code.*) Compare:
Arizona. Sec. 98 *Penal Code.*
Colorado. Sec. 1296 *Mills' Ann. Stats.*, 1891.
Utah. Sec. 4393 *Comp. Laws*, 1888.
Washington. Sec. 187 *Penal Code.*

§ 11. **Exercising Functions of Office Wrongfully.**—"Every person who willfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, willfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor." (*California. Sec. 75 Penal Code.*) Compare:

Arizona. Sec. 108 Penal Code.

Colorado. Sec. 296 Mills' Ann. Stats., 1887.

Idaho. Sec. 6388 Revised Statutes, 1887.

Montana. Sec. 133, p. 535, Comp. Stats., 1887.

Utah. Sec. 4402 Comp. Laws, 1888.

Washington. Sec. 186 Penal Code.

§ 12. **Consolidation with Tax Collector.**—

In counties where the Board of Supervisors, by proper ordinance, may so elect, the duties of sheriff and tax collector may be consolidated; and in counties where the duties of said officers have been, or may hereafter be, consolidated, in either manner above designated, the Board of Supervisors thereof, by proper ordinance, may elect to separate the duties so consolidated, and reconsolidate them in any other manner above provided, or may separate said duties without reconsolidation, and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will be best subserved thereby. When such offices are united and consolidated, the person elected to fill the offices so united and consolidated must take the oath and give the bond required for each, discharge all the duties pertaining to each, and receive the compensation affixed to the

offices. (*California. Secs. 57, 59 Co. Govt. Bill, Statutes 1893, pp. 366-7.*)

Arizona. Sec. 460 Revised Statutes, 1887.

§ 13. **Qualifications and Appointment of Deputies.**—The sheriff may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy. Deputies must be citizens of the United States. No county officer must be appointed or act as the deputy of another officer of the same county, except in cases where the pay of the officer so appointed amounts to a sum less than seventy-five dollars per month. (*California, Sec. 60, Co. Govt. Bill, Stats. 1893, p. 367; Stats. 1880, p. 23; also Sec. 843 Pol. Code.*) Compare:

Arizona. Sec. 497 Revised Statutes, 1887.

Colorado. Secs. 850, 852-3 Mills' Ann. Stats., 1891.

Idaho. Sec. 1815 Revised Statutes, 1887.

Montana. Secs. 851-2, p. 872, Comp. Stats. 1887.

Nevada. Sec. 2121 General Statutes, 1885.

Oregon. Secs. 993, 1026 Hill's Codes, 1892.

Utah. Sec. 105, p. 279, 1 Comp. Laws, 1888.

Washington. Sec. 79 II Hill's Codes, 1891.

§ 14. **Oath and Bond of Deputy.**—All deputies must, within ten days after receiving notice of their appointment, take and file an oath in the manner required of their principals, and may be required to give an official bond in a sum to be fixed by the sheriff. (*California, Secs. 910, 985 Pol. Code.*)

Arizona. Secs. 3061, 3071 *Revised Statutes*, 1887.

Colorado. Sec. 932 *Mills' Ann. Stats.*, 1887.

Idaho. Secs. 357, 424 *Revised Statutes*, 1887.

§ 15. **Powers and Duties of Deputies.**—A deputy has the same powers and duties as his principal, and whenever the official name of any principal officer is used in any law conferring power, or imposing duties or liabilities, it includes deputies. (*California.* Sec. 62, *Co. Govt. Bill, Statutes* 1893, p. 367; also Sec. 865, *Pol. Code.*)

Arizona. Sec. 3059 *Revised Statutes*, 1887.

Idaho. Sec. 1818 *Revised Statutes*, 1887.

Montana. Sec. 855, p. 873, *Compiled Statutes*, 1887.

Oregon. Sec. 994 *Hill's Codes*, 1892.

Washington. Sec. 169 I *Hill's Codes*, 1891.

§ 16. **Deputies for New Courts—Salary.**—In counties where the number of judges of the Superior Court has been increased since January 1, 1887, or shall thereafter be increased, the sheriff is allowed an additional deputy for each additional judge, his salary to be \$125 per month, payable out of the county treasury. (*California.* *Statutes* 1893, p. 507.)

§ 17. **Liability for Acts of Deputy.**—The sheriff and his sureties are responsible for all official neglect or misconduct of his deputies, and also for his acts not required by law, where he assumes to act under color or by virtue of his office. (*5 Am. & Eng. Enc. Law*, p. 634.) A trespass committed by a deputy sheriff, in his official character, is considered in law as committed directly and personally by his principal, and the latter

is liable therefor. (*Hirsch vs. Rand*, 39 Cal. 315; *Whitney vs. Butterfield*, 13 Cal. 335.) Compare:

Arizona. Secs. 497, 3032 *Revised Statutes*, 1887.

Colorado. Secs. 852, 860, *Mills' Ann. Statutes*, 1891.

§ 18. **Buying Appointments to Office.**—"Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor." (*California. Sec. 73 Penal Code.*)

Arizona. Sec. 106 *Penal Code.*

Idaho. Sec. 6387 *Revised Statutes*, 1887.

Utah. Sec. 4400 *Comp. Laws*, 1888.

§ 19. **Taking Rewards for Deputation.**—"Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State." (*California. Sec. 74 Penal Code.*)

Arizona. Sec. 107 *Penal Code.*

Idaho. Sec. 6387 *Revised Statutes*, 1887.

Utah. Sec. 4401 *Comp. Laws*, 1888.

§ 20. **Residence, Office and Office Hours.**—He must reside and have his office at the county seat, and must keep his office open for the transaction of business from nine o'clock A. M. until five o'clock P. M., non-judicial days excepted. (*California. Secs. 63, 66, Co. Govt. Bill, Statutes 1893, p. 367; Secs. 4116, 4119, Pol. Code.*) Compare:

Arizona. Secs. 473, 476 *Revised Statutes*, 1887.

Colorado. Sec. 930 *Mills' Ann. Statutes*, 1891.

Idaho. Secs. 1822, 1825 *Revised Statutes*, 1887.

Montana. Sec. 911, p. 886, *Compiled Statutes*, 1887.

Nevada. Sec. 2129 *General Statutes*, 1885.

Oregon. Sec. 991 *Hill's Codes*, 1892.

Washington. Sec. 78 II *Hill's Codes*, 1891.

§ 21. **Records Open to Inspection.**—The public records and other matters in the office of the sheriff are at all times, during office hours, to be open to the inspection of any citizen of the State. (*California. Sec. 1032 Pol. Code.*)

Arizona. Sec. 3125 *Revised Statutes*, 1887.

Colorado. Sec. 930 *Mills' Ann. Statutes*, 1891.

Idaho. Sec. 454 *Revised Statutes*, 1887.

§ 22. **General Duties.**—"The sheriff must:—

"1. Preserve the peace.

"2. Arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense.

"3. Prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge.

"4. Attend all courts, except justices', probate, and police courts, at their respective terms, held within his county, and obey their lawful orders and directions.

"5. Command the aid of as many male inhabitants of his county as he may think necessary in the execution of these duties.

"6. Take charge of and keep the county jail and the prisoners therein.

"7. Release on the record all attachments of real prop-

erty when the attachment placed in his hand has been released or discharged.

"8. Indorse upon all process and notices the year, month, day, hour, and minute of reception, and issue therefor to the person delivering it, on payment of fees, a certificate showing the names of the parties, title of paper, and time of reception.

"9. Serve all process and notices in the manner prescribed by law.

"10. Certify under his hand upon process or notices the manner and time of service, or, if he fails to make service, the reasons of his failure, and return the same without delay." (*Sec. 93 County Government Bill, Statutes 1893, p. 372.*) Compare:

Arizona. Sec. 496 Revised Statutes, 1887.

Colorado. Secs. 855-6 Mills' Ann. Statutes, 1891.

Idaho. Sec. 1871 Revised Statutes, 1887.

Montana. Secs. 855-6, p. 873, Comp. Stats, 1887.

Nevada. Secs. 21, 23-4, 1714 Gen. Stats., 1885.

Oregon. Secs. 996, 999 Hill's Codes, 1892; Art. VII, Sec. 16 Const.

Utah. Secs. 106, 116, pp. 279, 281, I Compiled Laws, 1888.

Washington. Sec. 76 II Hill's Codes, 1891; Sec. 169 I Hill; Sec. 207 Penal Code.

§ 23. **Process and Notice Defined.**—"Process" includes all writs, warrants, summons, and orders of courts of justice, or judicial officers. "Notice" includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer, or when required by law to be served independently of such proceeding. (*California. Sec. 92 Co. Govt. Bill, Stats. 1893, p. 371; Sec. 4175 Pol. Code.*)

Arizona. Sec. 495 *Revised Statutes*, 1887.

Idaho. Sec. 1870 *Revised Statutes*, 1887.

§ 23a. **Resistance to Process-Posse Comitatus.**

—"When a sheriff, or other public officer authorized to execute process, finds, or has reason to apprehend that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors. The officer must certify to the court from which the process issued the names of the persons resisting, that they may be proceeded against in due time for their contempt of court. If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, he must, upon the application of such sheriff, order such portion as shall be sufficient, or the whole, if necessary, of the organized national guard or enrolled militia of the State, to proceed to the assistance of the sheriff." (*California. Secs. 723-725 Penal Code.*) (See also *secs. 684-5 post.*)

Arizona. Secs. 1171-3 *Penal Code*.

Colorado. Sec. 856 *Mills' Ann. Statutes*, 1891.

Idaho. Secs. 7400-2 *Revised Statutes*, 1887.

Nevada. Sec. 1718-21 *General Statutes*, 1885.

Oregon. Sec. 1648 *Hill's Codes*, 1892.

Utah. Sec. 4438 *Compiled Laws*, 1888.

Montana. Sec. 19, p. 407, *Compiled Statutes*, 1887.

§ 24. **Sheriff to Act as Court Bailiff.** --The

sheriff, in attendance upon court, must act as the crier thereof, call the parties and witnesses, and all other

persons bound to appear at the court, and make proclamation at the opening and adjournment of the court, and of any other matter under its direction. (*California. Sec. 106 Co. Govt. Bill, Stats. 1893, p. 373. Also Sec. 22 ante.*)

Arizona. Sec. 510 Revised Statutes, 1887.

Colorado. Sec. 855 Mills' Ann. Statutes, 1891.

Idaho. Sec. 1884 Revised Statutes, 1887.

Nevada. Sec. 2124 General Statutes, 1885.

Utah. Sec. 188, p. 304, Compiled Laws, 1888.

§ 25. **Summoning Jurors and Grand Jury.**—

It is the duty of the sheriff to summon the members of all grand juries, and also all jurors for courts of record, and he may summon juries of inquest. (*California. Secs. 219, 241 Code Civil Procedure.*)

Arizona. Secs. 2195-7 Revised Statutes, 1887.

Colorado. Sec. 2613 Mills' Ann. Statutes, 1891.

Idaho. Secs. 3957, 3960-2, 3966 Rev. Stats., 1887.

Oregon. Sec. 962 Hill's Codes, 1892.

§ 26. **Diligence Required in Service of Process.**—The Supreme Court of California has declared, in the case of *Whitney vs. Butterfield*, 13 Cal. 336, that in the service of process the sheriff is responsible only for unreasonably, or not reasonably, executing it; that he is not bound to start on the instant of receiving a writ to execute it, without regard to anything else.

"The sheriff's liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to everyone who may be injured by his failure to discharge it. In respect to the execution of process, these official duties are well defined by law. The law is reasonable in this, as in all other things.

It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant after receiving a writ, to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has execution against A., and has no special instruction to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to execute it instantaneously as if he were so instructed and there were circumstances of urgency. So in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the State, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action. But, generally, in the absence of special circumstances, an attachment issued for the security of a debt, under the old statute authorizing such a process, does not stand upon a more favorable footing, so far as regards the necessity of immediate service, than an execution.

"It is true the statute (Wood's Dig. 183, § 125)

directs that the sheriff 'shall execute the writ of attachment without delay;' but this was not intended to introduce a new rule. The expression 'without delay' does not mean that the sheriff shall, the instant he receives process of this sort, lay aside all other business and proceed to execute it, unless some special reasons of urgency exist. The rule is thus stated by the Supreme Court of New York, in *Hinman vs. Borden* (10 Wend. 367): 'A sheriff is bound to use all reasonable endeavors to execute process.' It is true that some authorities hold the rule with more strictness. In *Lindsay's Executors vs. Armfield* (3 Hawks, N. C.) the sheriff was held liable for not levying from 7th October to 1st November, following—no explanation being offered for the failure. Mr. Justice Hall says 'the law declares it to be the duty of the sheriff to execute all process which comes to his hands, with the utmost expedition, or as soon after it comes into his hands as the nature of the case admits,' and cites Bacon Abridg. Sheriff N. That author holds the doctrine in the same language as that quoted. Mr. Justice Henderson, in the case in Hawks, states the doctrine a little different. He says: 'The sheriff should proceed with all convenient speed to levy the execution.' The learned American editor of Bacon cites, in support of the doctrine of the text, several cases, which we have examined. None of them sustain the rule in its strictness, even if we are to regard the doctrine of Bacon as laying down a different rule, so far as the liability of the sheriff is concerned, from that held in Wendell and other cases; for Bacon says the 'sheriff must not show any favor, nor be guilty of *unreasonable delay*.' In *Kennedy vs. Brent* (6 Cranch. 187) C. J. Marshall holds that the marshal is bound to serve the process as soon as he reasonably can.

"The question of unreasonable delay is a mixed question of law and fact, each case depending on its own circumstances."

§ 26a. **Liability for Delay.**—"If a sheriff does not return a process or notice in his possession, with the necessary indorsement thereon, without delay, he is liable to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him.

"If the sheriff, to whom a writ of execution is delivered, neglects or refuses, after being required by the creditor or his attorney, the fees having first been paid or tendered, to levy upon or sell any property of the party charged in the writ, which is liable to be levied upon and sold, he is liable to the creditor for the value of such property." (*California. Secs. 96, 97 Co. Govt. Bill; Secs. 4179, 4180 Pol. Code.*)

Arizona. Secs. 500, 501 Revised Statutes, 1887.

Colorado. Sec. 864 Mills' Ann. Statutes.

Idaho. Secs. 1874, 1875 Revised Statutes, 1887.

Washington. Sec. 170 I Hill's Codes, 1891.

§ 27. **Specially Conferred Powers and Duties.**—In addition to the general duties of the sheriff as prescribed by the general statutes relating to the office, he has such other powers and duties as may be imposed upon him by any other statutes, in the execution of which his services may be required. This is sometimes enacted into a code or statutory provision that "the sheriff must perform such other duties as are required of him by law." (*California. Statutes 1893, p. 374; Sec. 4193 Political Code.*)

§ 28. **Attendance upon Supervisors.**—The Board of Supervisors shall have power to direct the

sheriff to attend, in person or by deputy, all the meetings of the Board, to preserve order, serve notices, subpoenas, citations, or other process, as directed by the Board. (*California. Secs. 27, 29, Co. Govt. Bill, Statutes 1893, p. 360; Sec. 4047 Political Code.*)

Arizona. Sec. 399 Revised Statutes, 1887.

Utah. Sec. 188, p. 304, Compiled Laws, 1888.

§ 29. **Process of Court-Martial.**—"Every sheriff and constable must serve all orders, subpoenas, or process delivered to him for that purpose by any member of a court-martial." (*California. Sec. 2084 Pol. Code.*)

§ 30. **Receivership in Insolvency Cases.**—In California, by the provisions of section 6 of the Insolvency Act, upon the filing of the petition the order of adjudication of insolvency is made, which also appoints the sheriff a receiver to take charge of and keep all the estate of the debtor until the appointment of an assignee. His oath, undertaking, and powers, as such receiver, are regulated by the general laws of the State applicable to receivers. (*Statutes 1891, p. 511.*)

§ 31. **Powers and Duties as Receiver and Assignee.**—When the sheriff is appointed by the court as receiver in an insolvency or other proceeding, either under express statutory authority or under the equity powers of the court, his powers and duties are the same as those of other receivers, and are either prescribed by the statute or conform to the practice in equity, as the case may be. When elected assignee in insolvency cases, his powers and duties are prescribed by the statute authorizing the election.

§ 32. **Duties as to Wrecks.**—"The sheriff in each county must give all possible aid and assistance to vessels stranded on its coast, and to the persons on board the same, and exert himself to save and preserve such persons, vessels, and their cargoes, and all goods and merchandise which may be cast by the sea upon the land, and to this end may employ as many persons as he may think proper. All citizens must aid the sheriff when required.

"The sheriff of every county in which any wrecked property is found, when no owner or other person entitled to possession appears, must take possession of it in the name of the people, cause the value thereof to be appraised by disinterested persons, and keep it in some safe place to answer the owner's claims," and dispose of it only in the manner provided by law. (*California. Secs. 2403, 2406-2418 Political Code.*)

§ 33. **Removal of Intruders on State Waste Lands.**—"If any person, under any pretense of any claim inconsistent with the sovereignty and jurisdiction of the State, intrudes upon any of the waste or ungranted lands of the State, the district attorney of the county must immediately report the same to the governor, who must thereupon, by a written order, direct the sheriff of the county to remove the intruder; and if resistance to the execution of the order is made or threatened, the sheriff may call to his aid the power of the county, as in cases of resistance to the writs of the people." (*California. Sec. 42 Pol. Code.*)

§ 34. **To Provide Rooms for Courts and Judges When.**—If suitable rooms for holding the Superior Courts, and the chambers of the judges of such courts, be not provided in any county by the

supervisors thereof, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts may direct the sheriff of such county to provide such rooms, attendants, furniture, fuel, lights, and stationery, and the expenses thereof are a charge against such county. (*California. Sec. 144 Code Civil Procedure.*)

Under this statute, the court can only require the sheriff to provide such quarters as the court "presently requires for the transaction of its business," and cannot interfere with a contract for a courthouse in course of erection. (*Los Angeles Co. vs. Superior Court, 93 Cal. 380.*)

Colorado. Sec. 435 Code Civil Procedure.

§ 35. **Sheriff as Auctioneer.**—"In any city or town where there is no auctioneer, the sheriff or a constable thereof is *ex-officio* auctioneer, and is permitted to sell any property, real or personal, at public auction; and for any delinquency as such *ex-officio* auctioneer he is liable on his official bond." (*California. Sec. 3291 Political Code.*)

§ 36. **Prevention of Offenses.**—It is the duty of the sheriff to prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge, and to arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense. (*California. Sec. 93 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 697 Penal Code.*)

Arizona. Sec. 496 Revised Statutes, 1887.

Colorado. Sec. 856 Mills' Ann. Statutes, 1891.

Idaho. Sec. 7375 Revised Statutes, 1887.

Nevada. Sec. 1714 General Statutes, 1885.

§ 37. **Prevention of Duels.**—If the sheriff has knowledge of the intention on the part of any persons to fight a duel, and does not exert his official authority to arrest the party and prevent the duel, he is punishable by fine not exceeding one thousand dollars. (*California. Sec. 230 Penal Code.*)

Arizona. Sec. 359 Penal Code.

Colorado. Sec. 1311 Mills' Ann. Statutes, 1891.

Idaho. Sec. 6715 Revised Statutes, 1887.

Nevada. Sec. 1705 General Statutes, 1885.

Utah. Sec. 4479 Compiled Laws, 1888.

§ 38. **Suppression of Riots—Posse Comitatus.**
—“When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the State, immediately to disperse. If the persons assembled do not immediately disperse, such magistrate and officers must arrest them, and to that end may command the aid of all persons present or within the county. When there is an unlawful or riotous assembly with the intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the State, or of the United States, and the fact is made known to the governor, or to any justice of the Supreme Court, or to the superior judge or sheriff of the county, or to the mayor of a city, or to the president of the Board of Supervisors of the cities and counties of Sacramento and San Francisco, either of those officers may issue an order directed to the commanding officer of a divi-

sion or brigade of the organized national guard or enrolled militia of the State, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified to aid the civil authorities in suppressing violence and enforcing the laws;" and such armed force must obey the orders of such civil officer in relation thereto. "If in the opinion of such civil officer it shall become necessary that the troops shall fire or charge upon any mob or body of persons so assembled, such civil officer shall give a written order to that effect to the superior officer present in command of such troops, who will at once proceed to carry out the order, and shall direct the firing and attack to cease only when such unlawful assembly shall have been dispersed, or when ordered to do so by the proper civil authority. When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officers having the process to execute it, he may, on the application of the officer, or of the district attorney or county judge of the county, by proclamation published in such papers as he may direct, declare the county to be in a state of insurrection, and may order into the service of the State such number and description of the organized national guard or volunteer uniformed companies, or other militia of the State, as he deems necessary, to serve for such term and under the command of such officer as he may direct." Any person who, after the publication of such proclamation, resists or aids in resisting the execution of process in any county declared to be in a state of insurrection, or who

aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, is punishable by imprisonment in the State prison not less than two years. (*California. Secs. 726-732, 411 Penal Code.*) Compare:

Arizona. Secs. 1174-81 Penal Code.

Colorado. Secs. 856, 1310 Mills' Ann. Stats, 1891.

Idaho. Secs. 7403-8 Revised Statutes, 1887.

Nevada. Secs. 1718-30 General Statutes, 1885.

Oregon. Secs. 1649-59 Hill's Codes, 1892.

Montana. Secs. 14-18, p. 406; Secs. 142-5, p. 538, Compiled Statutes, 1887.

Utah. Secs. 4812-16 Compiled Laws, 1888.

Washington. Secs. 92-94 Penal Code.

§ 39. **Remaining at Place of Riot after Warning.**—"Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor." (*California. Sec. 409 Penal Code.*)

Arizona. Sec. 653 Revised Statutes, 1887.

Colorado. Sec. 1306 Mills' Ann. Stats., 1891.

Idaho. Sec. 6955 Revised Statutes, 1887.

Utah. Sec. 4594 Comp. Laws, 1888.

Washington. Sec. 94 Penal Code.

§ 40. **Neglect to Disperse Rioters.**—"If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority

with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor." (*California. Sec. 410 Penal Code.*)

Arizona. Sec. 654 Revised Statutes, 1887.

Idaho. Sec. 6956 Revised Statutes, 1887.

Montana. Sec. 159, p. 544, Comp. Statutes, 1887.

Utah. Sec. 4595 Comp. Laws, 1888.

§ 41. **Prosecution of Gamblers.**—"Every sheriff, district attorney, constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of the Penal Code relative to gambling; and every such officer refusing or neglecting so to do, is guilty of a misdemeanor." (*California. Sec. 335 Penal Code.*) Compare:

Colorado. Sec. 1343 Mills' Ann. Statutes, 1891.

Washington. Sec. 145-6 Penal Code.

§ 42. **Officer Must Not Act as Attorney.**—Sheriffs and their deputies are prohibited from practicing law, or acting as attorneys or counselors at law, in the counties where they reside and hold office, or from having as a partner a lawyer, or anyone who acts as such. (*California. Sec. 68 Co. Govt. Bill, Statutes 1893, p. 368; Sec. 4121 Political Code.*) Nor is it lawful for the sheriff nor any of his deputies of the City and County of San Francisco to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending, or to be sued or prosecuted before the justices of the peace of that city and county, or any of them, or which may be within their jurisdiction; and a violation of this provision shall be deemed a misdemeanor in office.

Arizona. Secs. 115, 478 *Revised Statutes*, 1887.

Colorado. Secs. 863, 204 *Mills' Ann. Stats.*, 1891.

Idaho. Sec. 1827 *Revised Statutes*, 1887.

Montana. Sec. 862, p. 874, *Comp. Statutes*, 1887.

Oregon. Sec. 1024 *Hill's Codes*, 1892.

Washington. Sec. 327 *I Hill's Codes*, 1891; Sec. 82 *II Hill*.

§ 43. **May Administer Oaths.**—The sheriff and his deputies may administer and certify oaths. (*California*, Sec. 65 *Co. Govt. Bill*, Sec. 4118 *Pol. Code*.) As this statutory power is conferred without restrictions, the exercise of the power would seem to be not limited to matters otherwise coming within the line of his official business. (*Pffciiffer vs. Riehn*, 13 *Cal.* 648.)

Arizona. Sec. 475 *Revised Statutes*, 1887.

Idaho. Sec. 1824 *Revised Statutes*, 1887.

§ 44. **Payment of Moneys to Treasurer.**—The sheriff must pay into the county treasury, on the first Monday in each month, the fees allowed by law in all cases, except such fees as are a charge against the county, and must accompany the same by a statement of the aggregate amount thereof, as shown by the fee book, duly verified by the officer by his affidavit in the form prescribed by law. (*California.* Secs. 217, 219 *Co. Govt. Bill*, *Statutes* 1893, pp. 508-9.)

Arizona. Sec. 428 *Revised Statutes*, 1887.

Colorado. Sec. 15, Art. XIV, *Constitution*, Sec. 921 *Mills' Ann. Statutes*.

Montana. Sec. 967, p. 908, *Comp. Statutes*, 1887.

Idaho. Sec. 2120 *Revised Statutes*, 1887.

Washington. Sec. 172 *I Hill's Codes*, 1891.

§ 45. **Sheriffs to Give Dead Bodies to Physicians.** “The sheriff or keeper of a county jail must surrender the dead bodies of such persons as are required to be buried at the public expense to any physician or surgeon, to be by him used for the advancement of anatomical science, preference being always given to medical schools by law established in this State, for their use to the instruction of medical students. But if such person during his last sickness requested to be buried, or if, within twenty-four hours after his death, some person claiming to be of kindred or a friend of the deceased requires the body to be buried, or if such deceased person was a stranger or traveler who suddenly died before making himself known, such dead body must be buried without dissection.” (*California. Sec. 3094 Political Code.*)

§ 46. **Food and Lodging for Juries.**—While a jury are kept together, either during the progress of the trial or after their retirement, for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging. (*California. Sec. 1136 Penal Code.*)

§ 47. **Embezzlement and Falsification of Accounts.**—“Every officer of this State, or of any county, city, town, or district of this State, and every other person charged with the receipt, safe keeping, transfer, or disbursement of public moneys, who either :

“1. Without authority of law appropriates the same or any portion thereof to his own use, or to the use of another; or,

“2. Loans the same or any portion thereof; or,

“3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

"4. Unlawfully deposits the same or any portion thereof in any bank, or with any banker or other person; or,

"5. Changes or converts any portion thereof from coin into currency or from currency into coin or other currency, without authority of law; or,

"6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

"7. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

"8. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

"9. Willfully omits to transfer the same, when such transfer is required by law; or,

"10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same:

—Is punishable by imprisonment in the State prison for not less than one nor more than ten years, and is disqualified from holding any office in this State."

(*California. Sec. 424 Penal Code.*) Compare:

Arizona. Sec. 675 Penal Code.

Colorado. Sec. 13 Art. X Constitution; Secs. 3309, 1245-51 Mills' Ann. Statutes, 1891.

Idaho. Secs. 6534, 6975 Revised Statutes, 1887.

Nevada. Secs. 1696, 1689-91, 2411, 4547, 4709-10 General Statutes, 1885.

Montana. Secs. 87-89, p. 519; Sec. 114, p. 530. Compiled Statutes, 1887.

Utah. Secs. 4603-4, 4656 Compiled Laws, 1888.

Washington. Sec. 184 Penal Code.

§ 48. **Larceny, Mutilation or Destruction of Records.**—"Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the State prison not less than one nor more than fourteen years." (*California. Sec. 113 Penal Code.*) Compare:

Arizona. Sec. 178 Penal Code.

Colorado. Sec. 1276 Mills' Ann. Statutes, 1891.

Montana. Sec. 114, p. 530, Compiled Statutes, 1887.

Nevada. Sec. 1696 General Statutes, 1885.

Idaho. Sec. 6464 Revised Statutes, 1887.

Utah. Secs. 4416-7 Compiled Laws, 1888.

§ 49. **Breach or Omission of Duty.**—For every failure or refusal to perform official duty when the fees are tendered, he is liable on his official bond. (*California. Sec. 223 Co. Govt. Bill, Statutes 1893, p. 510.*) "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor." (*California. Sec. 176 Penal Code.*) In *Ex Parte Harrold*, 47 Cal. 129, it is declared that this provision does not apply to conditions or qualifications on which the incumbent's right to hold an office depends, but to duties pertaining to the office, while in the discharge of official duties.

Arizona. Sec. 256 Penal Code.

Colorado. Sec. 1303 Mills' Ann. Statutes, 1891.

Idaho. Sec. 6465 Revised Statutes, 1887.

Montana. Sec. 266, p. 579; Sec. 927, p. 889, Compiled Statutes, 1887.

Oregon. Sec. 1852 Hill's Codes, 1892.

Utah. Sec. 4447 Compiled Laws, 1888.

Washington. Sec. 170 I Hill's Codes, 1891; Sec. 1186 II Hill; Sec. 183 Penal Code.

§ 50. **Asking or Receiving Bribes.**—"Every executive officer, or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State." (*California. Sec. 68 Penal Code.*)

Arizona. Sec. 101 Penal Code.

Colorado. Secs. 1274-5, 1302 Mills' Ann. Statutes, 1891.

Idaho. Secs. 6380-1 Revised Statutes, 1887.

Nevada. Secs. 1686-7 General Statutes, 1885.

Oregon. Sec. 1829 Hill's Codes, 1892.

Utah. Secs. 4396, 4398 Compiled Laws, 1888.

Washington. Sec. 173 Penal Code.

§ 51. **False Certificates.**—"Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he

knows to be false, is guilty of a misdemeanor." (*California. Sec. 167 Penal Code.*)

Arizona. Sec. 251 Penal Code.

Idaho. Sec. 6530 Revised Statutes, 1887.

§ 52. **Assaults by Officers.**—"Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding \$5,000, and imprisonment in the county jail not exceeding five years." (*California. Sec. 149 Penal Code.*)

Arizona. Sec. 234 Penal Code.

Idaho. Sec. 6516 Revised Statutes.

§ 53. **Examination by Supervisors.**—"Whenever the Board of Supervisors of any county shall deem it necessary or important to examine . . . any officer of the county in relation to the discharge of his official duties, as to the receipt or disposition by him of any moneys, or concerning the possession or disbursement by him of any property belonging to the county, or to use, inspect, or examine any books, account, voucher, or document in the possession of such officer or other person, or under his control, relating to the affairs or interests of such county, the chairman of such board shall issue a subpoena, in proper form, commanding such person or officer to appear before such board, at a time and place therein specified, to be examined as a witness, and such subpoena may contain a clause requiring such person or officer to produce on such examination all books, papers, and documents in his possession or under his control, relating to the affairs or interests of the county." (*California. Sec. 28 Co. Govt. Bill, Statutes 1893, p. 360.*)

Utah. Sec. 189, p. 304, Compiled Laws, 1888.

§ 54. **Sheriff's Badges.**—The boards of supervisors of the several counties of this State must furnish to the sheriff, under sheriffs, and deputy sheriffs of their respective counties, a suitable badge of office, upon which shall be inscribed the words "sheriff" and "deputy sheriff." (*California. Statutes 1875 6, p. 803.*)

§ 54a. **Appointment of Under Sheriff.**— In California "the Board of Supervisors may allow the sheriff an under sheriff, at a salary to be fixed by the board, not to exceed \$200 per month," in counties of the second class. (*Sec. 164, Sub. 17 Co. Govt. Bill, Statutes 1893, p. 393.*)

§ 55. **Direction to Sheriff Must Be in Writing.**
 — "No direction or authority by a party or his attorney to a sheriff, in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing, signed by the attorney of the party, or by the party, if he has no attorney." (*California. Sec. 102 Co. Govt. Bill, Statutes 1893, p. 373; Sec. 4185 Political Code.*)

Arizona. Sec. 506 Revised Statutes, 1887.

Idaho. Sec. 1880 Revised Statutes, 1887.

Oregon. Sec. 1020 Hill's Codes, 1892.

§ 56. **When Sheriff Justified in Executing Process.** "A sheriff, or other ministerial officer, is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." (*California. Sec. 104 Co. Govt. Bill, Statutes 1893, p. 373; Sec.*

4187 *Political Code*.) *See also Secs. 204, 352 3, 377 post.*

Arizona. Sec. 508 Revised Statutes, 1887.

Idaho. Sec. 1882 Revised Statutes, 1887.

Oregon. Sec. 1022 Hill's Codes, 1892.

§ 57. **Officer to Exhibit Process.**—"The officer executing process must then, and at all times subsequent, so long as he retains it, upon request show the same, with all papers attached, to any person interested therein." (*California. Sec. 105 Co. Govt. Bill, Statutes 1893, p. 373; Sec. 4188 Political Code.*)

Arizona. Sec. 509 Revised Statutes, 1887.

Idaho. Sec. 1883 Revised Statutes, 1887.

Oregon. Sec. 1023 Hill's Codes, 1892.

§ 58. **Service on Sheriff, How Made.**—"Service of a paper, other than process, upon the sheriff may be made by delivering it to him or to one of his deputies, or to a person in charge of the office during office hours, or if no such person is there, by leaving it in a conspicuous place in the office." (*California. Sec. 107 Co. Govt. Bill, Statutes 1893, p. 373; Sec. 4190 Political Code.*)

Arizona. Sec. 511 Revised Statutes, 1887.

Colorado. Sec. 862 Mill's Ann. Statutes, 1891.

Idaho. Sec. 1885 Revised Statutes, 1887.

Montana. Sec. 861, p. 874, Compiled Statutes, 1887.

Nevada. Sec. 2136 General Statutes, 1885.

Oregon. Sec. 992 Hill's Codes, 1892.

§ 59. **Return of Process from Another County.**—"When process or notices are returnable to another county, he may inclose such process or notice in an envelope, addressed to the officer from whom the same

emanated, and deposit it in the post office, prepaying postage." (*California. Sec. 94 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 4177 Political Code.*)

Arizona. Sec. 498 Revised Statutes, 1887.

Idaho. Sec. 1872 Revised Statutes, 1887.

§ 60. **Return Prima Facie Evidence.**—"The return of the sheriff upon process or notices is *prima facie* evidence of the facts in such return stated." (*California. Sec. 95 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 4178 Political Code.*)

Arizona. Sec. 499 Revised Statutes, 1887.

Idaho. Sec. 1873 Revised Statutes, 1887.

§ 61. **Penalty for Non-return of Process, etc.**—"If the sheriff does not return a notice or process in his possession with the necessary indorsement thereon without delay, he is liable to the party aggrieved for the sum of two hundred dollars and for all damages sustained by him." (*California. Sec. 96 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 4179 Political Code.*)

Arizona. Sec. 500 Revised Statutes, 1887.

Colorado. Sec. 864 Mills' Ann. Statutes, 1891.

Idaho. Sec. 1874 Revised Statutes, 1887.

Montana. Sec. 863, p. 874, Compiled Statutes, 1887.

Nevada. Sec. 2126 General Statutes, 1885.

§ 62. **Liable for Refusing to Levy.**—"If the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he is liable to the creditor for the value of such property." (*California. Sec. 97 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 4180 Political Code.*)

Arizona. Secs. 501 Revised Statutes, 1887.

Idaho. Sec. 1875 Revised Statutes, 1887.

Nevada. Sec. 2127 General Statutes, 1885.

§ 63. **Neglect or Refusal of Sheriff to Pay Over Moneys.**—"If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting his legal fees), the amount thereof, with twenty-five per cent damages and interest at the rate of ten per cent per month from the time of demand, may be recovered by such person." (*California.* Sec. 98 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 4181 Political Code.)

"If any clerk, justice of the peace, sheriff, or constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law and within thirty days after the receipt thereof, he is guilty of a misdemeanor." (*California.* Sec. 427 Penal Code.)

"Every officer charged with the receipt, safe keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony." (*California.* Sec. 425 Penal Code.) See also Sec. 47 ante.

Arizona. Secs. 502, 676-8 Penal Code.

Colorado. Secs. 1245-8 Mills' Ann. Statutes, 1891.

Idaho. Secs. 1876, 6976, 6978 Revised Statutes, 1887.

Nevada. Sec. 2128 General Statutes, 1885.

Utah. Secs. 4604, 4606 Compiled Laws, 1888.

§ 64. **Receipt of Writ on Holiday.**—The sheriff cannot officially receive a writ which he is not authorized to execute on such day. If it be handed to him on a holiday, he receives it only as the agent of the

plaintiff until it comes to his hands officially upon the opening of the next business day. (*Whitney vs. Butterfield*, 13 Cal. 336.)

§ 65. **Service of Writs by Telegraph.**—In California and some other States, provision is made by statute for the transmission of writs by telegraph for service, in which case the service and return are made in the same manner as if the original were to be served.

Arizona. Secs. 1313 Penal Code.

California. Sec. 1017 C. C. P.; Sec. 850 Penal Code.

Nevada. Sec. 937 General Statutes, 1885.

§ 66. **Coroner to Execute Process When Sheriff a Party.**—"When the sheriff is a party to an action or proceeding, the process and orders therein, which it would otherwise be the duty of the sheriff to execute, must be executed by the coroner of the county; *provided*, when any action is begun against the sheriff, all process and order may be served by any person, a citizen of the United States, over the age of eighteen years, in the manner provided in the Code of Civil Procedure." (*California.* Sec. 108 Co. Govt. Bill, Statutes 1893, p. 374.

Arizona. Sec. 512 Revised Statutes, 1887.

Colorado. Secs. 868-9, 859 Mills' Ann. Statutes, 1891.

Idaho. Secs. 1886, 2085 Revised Statutes, 1887.

Montana. Secs. 867-8, p. 875, Comp. Statutes, 1887.

Oregon. Secs. 1027-9 Hill's Codes, 1892.

Washington. Sec. 81 II Hill's Codes, 1891.

§ 67. **Elisors to Act in Cases Designated.**—"Process and orders in an action or proceeding may be executed by a person residing in the county, designated

by the court, the judge thereof, or a county judge, and denominated an elisor, in the following cases:—

“ 1. When the sheriff and coroner are both parties;

“ 2. When either of these officers is a party and the process is against the other; and,

“ 3. When either of these officers is a party and there is a vacancy in the office of the other, or when it appears by affidavit to the satisfaction of the court in which the proceeding is pending, or to the judge thereof, that both of these officers are disqualified, or by reason of any bias, prejudice, or other cause, would not act promptly or impartially.

“ When process is delivered to an elisor, he must execute and return it in the same manner as the sheriff is required to execute similar process.” (*California. Sec. 109 Co. Govt. Bill, Stat. 1893, p. 374; Sec. 4192 Pol. Code.*)

Idaho. Sec. 1891 Revised Statutes, 1887.

Nevada. Secs. 2160–63 General Statutes, 1885.

Oregon. Secs. 1058–9 Hill's Codes, 1892.

§ 68. **Fees of Coroner or Elisor.**—“ Whenever process is executed, or any act performed by a coroner or elisor in the cases provided by law in that behalf, such coroner or elisor shall be entitled to receive the same fees as the sheriff would be entitled to receive for the same service, to be paid by the plaintiff in case of the summoning of jurors to complete the panel, and by the person or party requiring the service in all other cases in private actions. If rendered at the instance of the people, it shall be audited and paid as a county charge.” (*California. Sec. 109 Co. Govt. Bill, Statutes 1893, p. 374.*)

Nevada. Sec. 2163 General Statutes, 1885.

§ 69. **Vacancies.**—Strictly speaking, there can be no vacancy in the office of sheriff, caused by the death, removal or resignation of the incumbent, for upon the happening of such an event, the coroner, by operation of law, becomes sheriff, in the absence of statutory provision to the contrary. (*People vs. Phoenix*, 6 Cal. 92.) But the coroner only holds the office of sheriff *ex officio* until the appointment of a new sheriff by the Board of Supervisors. (*California. Sec Sec. 77 post.*) Compare:

Colorado. Sec. 851 Mills' Ann. Statutes, 1891.

Idaho. Sec. 1818 Revised Statutes, 1887.

§ 70. **When Vacancy Exists—Generally.**—
“The office of sheriff becomes vacant on the happening of either of the following events before the expiration of the term:—

- “1. The death of the incumbent.
- “2. His insanity, found upon a commission of lunacy issued to determine the fact.
- “3. His resignation.
- “4. His removal from office.
- “5. His ceasing to be an inhabitant of the . . . county. . . .
- “6. His absence from the State . . . beyond the period allowed by law.
- “7. His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness.
- “8. His conviction of a felony, or of any offense involving a violation of his official duties.
- “9. His refusal or neglect to file his official oath or bond within the time prescribed.
- “10. The decision of a competent tribunal declaring

void his election or appointment." (*California. Sec. 996 Pol. Code. See Sec. 67 Co. Govt. Bill.*) See also *Sec. 75 post* and *Sec. 50 ante*.

Arizona. Sec. 3111 Revised Statutes, 1887.

Colorado. Sec. 924 Mills' Ann. Statutes, 1891.

Idaho. Secs. 431, 1881 Revised Statutes, 1887.

Montana. Sec. 1046, p. 935, Compiled Statutes, 1887.

Nevada. Secs. 1670, 1713, 3964, Gen. Stats., 1885.

Oregon. Secs. 2551-2 Hill's Codes, 1892.

Washington. Sec. 342 I Hill's Codes, 1891.

§ 71. **Resignation—to Whom Sent.**—The resignation of the sheriff must be in writing and filed with the clerk of the Board of Supervisors. (*California. Sec. 995 Political Code.*) Compare:

Arizona. Sec. 3110 Revised Statutes, 1887.

Colorado. Sec. 923 Mills' Ann. Statutes, 1891.

Idaho. Sec. 430 Revised Statutes, 1887.

Montana. Sec. 1045, p. 934, Comp. Stats., 1887.

Nevada. Sec. 1669 General Statutes, 1885.

Oregon. Sec. 2550 Hill's Codes, 1892.

Washington. Sec. 341 I Hill's Codes, 1891.

§ 72. **Removal from Office by Summary Proceedings.**—"When an information in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the information was presented, and

on that day or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases." (*California. Sec. 772 Penal Code.*)

In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers—State, county, city, or township—where it is not so expressly provided, they may, in the discretion of the court, be removed from office. (*California. Sec. 661 Penal Code.*) See also next section.

Arizona. Sec. 1039 Penal Code.

Idaho. Secs. 7351, 7459 Revised Statutes, 1887.

Nevada. Secs. 3953-64 General Statutes, 1885.

§ 73. **Accusation by Grand Jury.**—"An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." (*California. Sec. 758 Penal Code.*)

Arizona. Secs. 1193, 1206 Penal Code.

Idaho. Sec. 7445 Revised Statutes, 1887.

Nevada. Secs. 1586-95 General Statutes, 1885.

§ 74. **Absence from the State.**—The sheriff shall, in no case, absent himself from the State for a period of

more than sixty days, and for no period without the consent of the Board of Supervisors of the county." (*California. Sec. 67 Co. Govt. Bill, Stats. 1893, p. 367; Sec. 4120 Political Code.*)

Arizona. Sec. 477 Revised Statutes, 1887.

Idaho. Sec. 1826 Revised Statutes, 1887.

§ 75. **Conviction of Certain Offenses.**—When the sheriff is committed under an execution or commitment for not paying over money received by him by virtue of his office, and remains committed for sixty days, his office is vacant. (*California. Stats. 1893, p. 373, Sec. 103; Sec. 4186 Political Code.*)

The Board of Supervisors, upon receiving a certified copy of the record of conviction of any officer for receiving illegal fees, must declare his office vacant. (*California. Stats. 1893, p. 510.*) *See also Sec. 70 ante.*

Arizona. Sec. 507 Revised Statutes.

Colorado. Sec. 3309 Mills' Ann. Statutes, 1891.

Idaho. Sec. 6436 Revised Statutes, 1887.

Washington. Sec. 191 Penal Code.

§ 76. **Withdrawal of Sureties.**—After the withdrawal of any of the sureties on the sheriff's official bond, in the manner prescribed in Sections 972 to 974, Political Code, the Superior Judge or Judges must make an order declaring the office vacant. (*California, Sec. 975 Political Code.*) Compare:

Arizona. Secs. 3087-8 Revised Statutes, 1887.

Colorado. Secs. 814-5 Mills' Ann. Stats, 1891.

Idaho. Secs. 412-7 Revised Statutes, 1887.

Nevada. Secs. 1750-4 General Statutes, 1885.

Washington. Secs. 2912-16 I Hill's Codes, 1891.

§ 77. **How Vacancy Is Filled.**—A vacancy in the office is filled by appointment made by the Board of

Supervisors. Appointees hold until the vacancies are filled by election. (*California. Sec. 4115 Pol. Code.*)

Compare:

Arizona. Sec. 472 Revised Statutes, 1887.

Colorado. Sec. 9, Art. XIV Constitution; Sec. 1589 Mills.

Idaho. Sec. 1821 Revised Statutes, 1887.

Montana. Secs. 1049, 1589, pp. 935, 1081, Compiled Statutes, 1887.

Nevada. Secs. 1676, 1684 General Statutes, 1885.

Oregon. Secs. 2554, 2391 Hill's Codes, 1892.

§ 78. **Not to Be Interested in Certain Contracts.**—The sheriff must not be interested in any contract made by him in his official capacity, such as contracts for sheriff's advertising and the like. (*California. Sec. 920 Penal Code.*)

Arizona. Sec. 3062 Revised Statutes, 1887.

Colorado. Sec. 1250 Mills' Ann. Stats., 1891.

Idaho. Sec. 365 Revised Statutes, 1887.

Nevada. Secs. 1711, 1713 General Statutes, 1885.

§ 79. **Not to Purchase at Certain Sales.**—The sheriff must not be a purchaser at any sale nor vender at any purchase made by him in his official capacity. (*California. Sec. 921 Penal Code.*)

Arizona. Sec. 3063 Revised Statutes, 1887.

Idaho. Sec. 366 Revised Statutes, 1887.

§ 80. **Not to Deal in Scrip, etc.**—The sheriff and his deputies are "prohibited from purchasing or selling, or in any manner receiving to their own use or benefit, or to the use or benefit of any person or persons whatever, any state, county, or city warrants,

scrip, orders, demands, claims, or other evidences of indebtedness against the state, or any county or city thereof, except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy, or clerk, and evidences of the funded indebtedness of such state, city, town, or corporation." (*California. Sec. 923 Political Code.*)

Idaho. Sec. 368 Revised Statutes, 1887.

Nevada. Secs. 1706-7, 1709 General Statutes, 1885.

Washington. Sec. 155 Penal Code.

§ 81. **Penalty for Violation.**—Any person violating any of the provisions of the three preceding sections "is punishable by a fine of not more than one thousand dollars, or by imprisonment in the State prison not more than five years, and is forever disqualified from holding any office in this State." (*California. Sec. 71 Penal Code.*)

Arizona. Sec. 104 Penal Code.

Idaho. Sec. 6384 Revised Statutes, 1887.

Nevada. Sec. 1713 General Statutes, 1885.

§ 82. **Expiration of Term—Execution of Process.**—"When any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office, and when the sheriff sells real estate, under and by virtue of an execution or order of Court, he or his successors in office shall execute and deliver to the purchaser or purchasers all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been exe-

cuted by the sheriff who made the sale." (*California, Statutes 1893, pp. 373-4, Sec. 107.*) Compare:

Arizona. Sec. 517 Revised Statutes, 1887.

Colorado. Sec. 858 Mills' Ann. Statutes, 1891.

Idaho. Sec. 1895 Revised Statutes, 1887.

Montana. Sec. 858, p. 873, Compiled Statutes, 1887.

Nevada. Sec. 2132 General Statutes, 1885.

Oregon. Sec. 1017 Hill's Codes, 1892.

§ 83. **Unfinished Business—Compensation of Successor.**—It is the duty of the sheriff to complete the business of his office to the time of the expiration of his term; and in case he shall leave to his successor official labor to be performed, which it was his duty to perform, he shall be liable to pay to his successor the full value for such services. (*California. Statutes 1893, p. 511, Sec. 227.*)

Washington. Sec. 325 I Hill's Codes, 1891.

§ 84. **To Surrender Books, etc., to Successor.**—"Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, willfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents, or other writing appertaining or belonging to his office, or mutilates, destroys, or takes away the same, is punishable by imprisonment in the State prison not less than one nor more than ten years." (*California. Sec. 76 Penal Code.*)

Arizona. Sec. 109 Penal Code.

Colorado. Sec. 857 Mills' Ann. Statutes, 1891.

Idaho. Secs. 1893, 1896, 6389 Rev. Stats, 1887.

Montana. Sec. 116, p. 531, *Compiled Statutes*, 1887.

Nevada. Sec. 1698 *General Statutes*, 1885.

Oregon. Secs. 1015-17 *Hill's Codes*, 1892.

Utah. Sec. 4403 *Compiled Laws*, 1888.

§ 85. **Resisting Public Officers.**—"Every person who willfully resists, delays, or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years."

"Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Secs. 148, 69 Penal Code.*)

Arizona. Secs. 233, 102 *Penal Code*.

Idaho. Sec. 6515 *Revised Statutes*, 1887.

Montana. Sec. 120, p. 532, *Compiled Statutes*, 1887.

Nevada. Sec. 1699 *General Statutes*, 1885.

Utah. Secs. 4397, 4436 *Compiled Laws*, 1888.

Washington. Sec. 179 *Penal Code*.

§ 86. **Justifiable Homicide by Public Officers.**—"Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

"1. In obedience to any judgment of a competent court; or,

"2. When necessarily committed in overcoming act-

ual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

“3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.” (*California. Sec. 196 Penal Code.*)

Arizona. Sec. 284 Penal Code.

Colorado. Secs. 1189, 3460 1 Mills' Ann. Statutes.

Idaho. Sec. 6569 Revised Statutes, 1887.

Nevada. Sec. 1716 General Statutes, 1885.

§ 87. **Retaking Goods from Officer.**—“Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.” (*California. Sec. 102 Penal Code.*)

Arizona. Sec. 153 Penal Code.

Idaho. Sec. 6447 Revised Statutes, 1887.

§ 88. **Giving or Offering Bribes to Officer.**—“Every person who gives or offers any bribe to any executive officer of this State, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the State prison not less than one nor more than fourteen years, and is disqualified from holding any office in this State.” (*California. Sec. 67 Penal Code.*)

Arizona. Sec. 100 Penal Code.

Colorado. Sec. 1275 Mills' Ann. Statutes, 1891.

Idaho. Sec. 6386 Revised Statutes, 1887.

Montana. Secs. 112-3 pp. 529, 530 Compiled Statutes, 1887.

Nevada. Secs. 1686-7 General Statutes, 1885.

Utah. Sec. 4395 Compiled Laws, 1885.

§ 89. **Fish Nets—Confiscation Unauthorized.**
—So much of § 636 of the Penal Code of California as declares that all nets, etc., used in catching or taking fish in violation of Chapter 1, Title XV, of said code, shall be forfeited, and may be seized by the peace officers of the county, and by them destroyed or sold, is unconstitutional and void. (*Ieck vs. Anderson*, 57 Cal. 251.) Confiscations without a judicial hearing and judgment, after due notice, are void, as not being due process of law.

§ 90. **Computing Time.**—"The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (*California. Sec. 12 Political Code.*)

Arizona. Secs. 920, 2069 Revised Statutes, 1887.

Idaho. Sec. 11 Revised Statutes, 1887.

§ 91. **When Act Falls on Holiday.**—"Whenever any act of a secular nature other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." (*California. Sec. 13 Political Code.*)

Arizona. Sec. 2070 Revised Statutes, 1887.

Idaho. Sec. 12 Revised Statutes, 1887.

§ 92. **Legal Holidays.**—In California the following are legal holidays: Every Sunday, January 1, February 22, May 30, July 4, September 9, the first Monday in October, December 25, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the governor of this State, for a public fast, thanksgiving, or holiday. If the first day of January, the 22d of February, the 30th of May, the 4th of July, the 9th of September, or the 25th of December, fall upon a Sunday, the Monday following is a holiday. Compare:

Arizona. Sec. 2068 Revised Statutes, 1887.

Colorado. Sec. 2127-8 Mills' Ann. Statutes, 1891.

Idaho. Sec. 10 Revised Statutes, 1887.

CHAPTER III.

CONSTABLES.

- § 93. Nature of the Office.
- § 94. Duties of the Office.
- § 95. Appointment of Deputies.
- § 96. Law Governing Acts of Constables.
- § 97. Arrest Outside of County—Fees.

§ 93. **Nature of the Office.**—The constable is the executive officer of the justice's courts in his township, and usually has by statute the same powers and duties as to the court and its process as the sheriff has with reference to the courts of record of the county. (*California. Secs. 4104, 4314-5 Political Code.*)

§ 94. **Duties of the Office.**—"Constables must attend the courts of justices of the peace within their townships whenever so required, and within their counties execute, serve, and return all process and notices directed or delivered to them by a justice of the peace of such county or by any competent authority." They also have the same general duties as the sheriff, excepting as to the custody of the county jail and attendance upon courts of record, as mentioned in Section 22, *ante*. Express statutory provision is also usually made, giving the constable the same powers as the sheriff in cases of attachment, replevin, and the like, in the justice's courts. (*California. Secs. 4314-5 Political Code; Secs. 869, 870 Code Civil Procedure.*)

§ 95. **Appointment of Deputies.**—A constable may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing and filed in the office of the county clerk; and until such appointment is made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy. (*California. Sec. 61 Co. Govt. Bill, Stats. 1893, p. 367.*)

§ 96. **Law Governing Acts of Constables.**—As the duties and powers of constables as to process issuing from justices' courts are the same as those of the sheriff with reference to process from the courts of record, the same rules of procedure and court decisions are applicable. Such provisions and decisions are to be found in the several chapters of this work devoted to the respective subjects.

Idaho. Sec. 2091 Revised Statutes, 1887.

§ 97. **Arrest Outside of County—Fees.**—In California, a constable may go outside of his county to execute criminal process provided the same be properly indorsed as provided by the statute; and the constable who makes such arrest is entitled to his fees for traveling both ways. (*Allen vs. Napa County, 84 Cal. 187.*)

CHAPTER IV.

SUMMONS.

- § 98. Office and Issuance of Summons.
- § 99. Prompt Service Due to Plaintiff.
- § 100. The Receipt.
- § 101. The Complaint.
- § 102. By Whom Served.
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- § 105. Service on Corporations—Decisions.
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- § 116. Form of Return.
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- § 119. Variation of Name—Idem Sonans.
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- § 121. General Return Sufficient.
- § 122. Return of Deputy Must Be Made in Name of Sheriff.
- § 123. Return When Not Served by Officer.
- § 124. Sheriff's Return Not Traversable.
- § 125. No Service after Return.
- § 126. Erasures in Return.

- § 127. Correction of Return.
- § 128. Amended Summons—Service of.
- § 129. Criminal Summons against Corporations.
- § 130. Summons in Justices' Courts.
- § 131. Service outside the County.
- § 132. Unauthorized Service Set Aside.

§ 98. **Office and Issuance of Summons.**—The office of a summons is to give the defendant authentic notice that an action has been commenced against him, to apprise him of the nature and amount of the claim of the plaintiff, and to compel his appearance in court to answer to these demands within a time stated, under penalty of forfeiting all subsequent right to dispute their validity or to prevent their enforcement. (*Wait's Practice*, p. 468.)

Summons out of a court of record is issued under the seal of the court and signature of the clerk.

§ 99. **Prompt Service Due to Plaintiff.**—The service of the summons—and, in fact, of any process—should not be unnecessarily delayed. The plaintiff is in pursuit of his rights, and he may reasonably expect prompt assistance in that pursuit, from the officers upon whom he must rely. Delay in the service of even so simple a process may subject him to irreparable loss. He is entitled by right to every facility which the law allows him to a speedy hearing of his cause before the court.

§ 100. **The Receipt.**—The original summons should be indorsed as soon as received, with the month, day, year, hour, and minute of its reception; and, when required by law, copies for service prepared, and compared with the original, to insure correctness,

and a copy of the complaint attached to each copy of the summons. (*California. Sec. 410 Code Civil Procedure; Sec. 4176 Penal Code.*)

Arizona. Sec. 699 Revised Statutes, 1887.

Nevada. Sec. 2125 General Statutes, 1885.

Idaho. Sec. 1871 Revised Statutes, 1887.

§ 101. **The Complaint.**—A copy of the complaint for service is usually furnished to the officer with the original summons, when required for service. If not so furnished and the officer prepares the copy by request of the plaintiff, he may charge his lawful fees for making such copy. If the case is brought in a justice's court, in most states the complaint may be either a concise statement in writing of the facts constituting the plaintiff's cause of action or a copy of the account, note, bill, bond, or instrument upon which the action is based. (*California. Sec. 853 Code Civil Procedure.*) Compare:

Arizona. Sec. 1417 Revised Statutes, 1887.

Idaho. Sec. 4668 Revised Statutes, 1887.

Montana. Sec. 771 Code Civil Procedure.

Nevada. Secs. 3553, 3536 General Statutes, 1885.

Oregon. Secs. 2072-74 I Hill's Codes, 1892.

Utah. Sec. 730 Code Civil Procedure.

Washington. Secs. 1452-53, II Hill's Codes, 1891.

§ 102. **By Whom Served.**—The code and statutory provisions vary much in different states as to the service of summons. In California, Idaho, and Montana, service may be made by the sheriff or by any other person over the age of eighteen, not a party to the action. In Arizona it may be served by the sheriff or any constable or by any disinterested person compe-

tent to make oath of the fact. In Colorado the sheriff or his deputy or any person not a party to the action may make service. In Nevada the summons may be served by the sheriff or his deputy, or by any citizen of the United States over twenty-one years of age. In Oregon service must be made by the sheriff or his deputy, or by a person appointed by him or by the court or judge. In Utah the summons must be served by the United States Marshal or by the sheriff of the county where the defendant is found. In Washington the summons may be served by the sheriff or by his deputy or by a citizen of the state over twenty-one years of age who is competent to be a witness in the action, other than the plaintiff.

Arizona. Secs. 699, 707 *Revised Statutes, 1887.*

California. Sec. 410 *Code Civil Procedure.*

Colorado. Sec. 37 *Code Civil Procedure.*

Idaho. Sec. 4143 *Revised Statutes, 1887.*

Montana. Sec. 71 *Code Civil Procedure.*

Nevada. Sec. 3050 *General Statutes, 1885.*

Oregon. Sec. 54 II *Hill's Codes.*

Utah. Sec. 267 *Code Civil Procedure.*

Washington. Sec. 174 I *Hill's Codes, 1891.*

§ 103. **How Served, Generally.**—In California service of summons is made by delivering to each of the defendants personally a copy of the summons and a copy of the complaint. In Arizona a copy of the complaint need be delivered, with the copy of summons, only to such defendants as are served outside the county. In Colorado, only a copy of the summons is required to be served. In Idaho a copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in

which case a copy of the complaint need only be served upon one of such defendants. In Nevada the copy of summons served must be attached to a certified copy of the complaint in all cases. In Oregon a copy of the summons is delivered, together with a copy of the complaint prepared and certified by the plaintiff, his agent, or attorney, or by the county clerk. In Utah a certified copy of the complaint must be served with the summons, unless two or more defendants reside in the same district, in which case a copy of the complaint need only be served upon one of such defendants. In Washington service is made by delivery of a copy, certified by plaintiff's attorney or the sheriff, together with a copy of the complaint, certified by the plaintiff's attorney or the clerk of the court.

In Colorado, Oregon, Utah, and Washington, service may be made at the family residence upon some member of the defendant's family in certain cases.

Arizona. Secs. 701-2 *Revised Statutes, 1887.*

California. Secs. 410, 411 *Code Civil Procedure.*

Colorado. Sec. 38 *Code Civil Procedure.*

Idaho. Sec. 4143 *Revised Statutes, 1887.*

Montana. Secs. 71, 72 *Code Civil Procedure.*

Nevada. Sec. 3051 *General Statutes, 1885.*

Oregon. Sec. 55 *I Hill's Codes, 1892.*

Utah. Secs. 267-8 *Code Civil Procedure.*

Washington. Sec. 173 *II Hill's Codes.*

§ 104. **Corporations, Minors, and Insane Persons.**—In California the summons is served by delivering a copy thereof (and of the complaint), as follows :

“ 1. If the suit is against a corporation formed under the laws of this State : to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

"2. If the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this State: to such agent, cashier, or secretary.

"3. If against a minor, under the age of fourteen years, residing within this State: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

"4. If against a person residing within this State who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such person and also to his guardian.

"5. If against a county, city, or town: to the president of the Board of Supervisors, president of the council, or trustees, or other head of the legislative department thereof." (*Sec. 411 Code Civil Procedure.*)

More or less similar provisions exist in other states. In Nevada, special provisions exist as to the mode of service upon California corporations doing business in that State, and in Arizona there are no special provisions regulating service upon minors and insane persons.

Arizona. Secs. 702-5 *Revised Statutes*, 1887.

Colorado. Sec. 38 *Code Civil Procedure*.

Idaho. Sec. 4143 *Revised Statutes*, 1887.

Montana. Sec. 72 *Code Civil Procedure*.

Nevada. Sec. 305 *General Statutes*, 1885.

Oregon. Sec. 55 I *Hill's Codes*, 1892.

Utah. Sec. 268 *Code Civil Procedure*.

Washington. Sec. 173, II *Hill's Codes*.

§ 105. Service on Corporations—Decisions.—

The manner of service upon corporations, insane persons, counties, cities and towns in California is prescribed in Section 411 of the Code of Civil Procedure. (*Sec. 104 ante.*)

In an action against a corporation, where the summons was served upon Bristol, who had been duly elected its president, and presided at several meetings of its board of trustees, and who had never resigned, or been removed, or his office declared vacant, or a permanent president chosen in his place, though he had left the county and no longer took any part in the management of the corporation affairs, and at the meeting of the board after his so leaving the county, another person was elected president *pro tem.* for that meeting, and was regarded by the stockholders as the president; *held* that Bristol was still president *de jure*, and the service upon the corporation valid. (*Eel River N. Co. vs. Struver*, 41 Cal. 618.)

In *Rowe vs. Table Mountain W. Co.*, 10 Cal. 444, a question was raised as to the regularity of a judgment by default, on a service of the summons upon one M. as president, and C. as secretary, without proof beyond the mere return that those persons were such officers. The court held that as the statute expressly authorized a service upon the corporation by serving the summons on their officers, and as the practice had been to take judgment by default upon similar returns, they would not hold it erroneous.

§ 106. Service upon Foreign Corporations.—

When foreign corporations are required to file with the Secretary of State an instrument designating a person upon whom process might be served, service of sum-

mons upon such person is sufficient, so long as such designation is not revoked, and although such person is not one of the officers of the corporation mentioned in the code section prescribing the persons upon whom service of summons against a corporation may be made generally. (*Eureka Lake & Y. C. Co. vs. Superior Court*, 66 Cal. 311.)

When the statute provides for service of summons upon the "managing agent or cashier" of a foreign corporation, service upon a person employed as clerk in a store belonging to it is not sufficient, although he has the custody of moneys of the corporation, keeps accounts of employes and pays them. (*Blanc vs. Paymaster Mining Co.*, 95 Cal. 524.)

§ 107. **Service on Minors.**—Under the California Code provision for service of summons upon minors (*Sec. 104 ante*), not only should a copy of the summons be delivered to each minor, but a copy for each minor should be delivered to the father, mother, or guardian, or the person having the care or control of such minors, or with whom they reside, or in whose service they are employed.

If a father sues his infant son residing with him, and the statute requires the summons to be served personally on the infant and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service. (*Brown vs. Lawson*, 51 Cal. 615.)

§ 108. **Service on Partnership.**—"When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates

may be sued by such common name, the summons in such cases being served on one or more of the associates, and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability." (*California. Sec. 388 Code Civil Procedure.*)

Idaho. Sec. 4112 Revised Statutes, 1887.

Montana. Sec. 25 Code Civil Procedure.

Utah. Sec. 246 Code Civil Procedure.

§ 109. **In Actions against Vessels.**—In an action against a steamer, vessel, or boat, "the summons and copy of the complaint must be served on the owners if they can be found, otherwise they may be served on the master, mate, or person having charge of the steamer, vessel or boat." (*California. Sec. 816 Code Civil Procedure.*)

Montana. Sec. 214 Code Civil Procedure.

§ 110. **Service to be Personal.**—Unless the statute provides otherwise, as in Colorado, Montana, Oregon, and Washington (*Sec. 103 ante*), the copy of summons must be delivered to the defendant personally. It is no service on a defendant to deliver it to any relative of the defendant for him. In case of defendants other than natural persons of sound mind and over the age of majority, care must be taken that the service be made strictly according to the requirements of the statute.

The law is explicit in this regard, and wisely so; for, if it were otherwise, advantage might be taken in many ways by evil-disposed persons to defraud defendants of their rights. A court acquires no jurisdiction

over a defendant who has not been legally brought into court.

§ 111. **Long Delay in Service of Summons.**—

If the plaintiff fails to prosecute his suit with reasonable diligence the suit may be dismissed on motion of the defendant. The question of whether the delay in prosecution by failure to serve the summons is reasonable, is one for the consideration of the court under all the circumstances of each particular case. In California, since 1889, an action may be dismissed if the summons is not served and returned within three years after the commencement of the action. (*Sec. 581 C. C. P.*) Under this provision, however, the court still has discretionary power to dismiss for inexcusable delay before the expiration of that period. (*Kreiss vs. Hotaling*, 99 Cal. 383.)

§ 112. **Inexcusable Delay—Instances.**—If a summons is not served until three years after the complaint is filed and it is issued, and there is no reasonable excuse for the delay, the service will be set aside, on motion, and the suit dismissed. (*Eldridge vs. Kay*, 45 Cal. 49.) In this case the defendants during all the time were living within a short distance of the plaintiff, and were easy to be found. The court held that such delay was absolutely without excuse, and that it would be a practical defeat of the statute, which limits the issuance of a summons to the period of one year after the filing of the complaint.

Where a complaint was filed and summons issued more than eight years before service, a motion to set aside the summons and strike the complaint from the files was properly granted. (*Dupuy vs. Shear*, 29 Cal. 238.)

Allowing an action to rest without service of summons, for two years and eight months after the summons is issued, is such a want of diligence as to justify the court in dismissing the action. (*Grigsby vs. Napa Co.*, 36 Cal. 585.)

In Oregon the summons must be served or attempted to be served before the expiration of the time provided by the statute of limitations, or the action will be barred. (*Secs. 14, 15 Code Civil Procedure.*)

§ 113. **Refusing Service.**—Serious annoyances sometimes occur from incomplete service of summons, and from imperfect returns of service. Defendants often attempt to avoid service, and when found and the summons is tendered to them, refuse to take it.

It is a sufficient service in such a case to lay the summons upon the defendant's arm or shoulder, or reach it toward him and let go of it, leaving it to the defendant to take or let it alone. It does not lie in the mouth of a person to say he was not served with process when it is offered to him and he refuses to take it.

§ 114. **Fraudulent Service.**—A trick, depriving a defendant of fair notice that an action has been commenced, is a fraud. Thus, if one departing for a foreign country, when on the steamer, which is about to start, is handed a sealed package containing the summons, and he has no reasonable opportunity to discover its contents before leaving, the service is not good. (*Bulkley vs. Bulkley*, 6 Abb. Pr. 307.)

Service of summons to be effective must have been intended as such, and the defendant must know that service was intended. (*Heatherly vs. Hadley*, 2 Or. 276; *Beckman vs. Cutter*, 2 Code Rep. 51; *Niles vs.*

Vandezee, 14 How. Pr. 547; *Davison vs. Baker*, 24 How. Pr. 39.)

There are numerous authorities declaring that where a defendant is brought into the territorial jurisdiction of the court by force, or induced to come within the jurisdiction by deceitful or fraudulent practices, for the purpose of having him served with process therein, such service is not good, and will not confer jurisdiction, but will be set aside.

Service of summons upon a man who is so drunk that he cannot comprehend may be considered in its nature fraudulent, and set aside. (*Murphy vs. Loos*, 104 Ill. 514.) So service by laying a summons on the body of a man too sick to understand it, is not valid. (*People vs. Superior Judge*, 38 Mich. 310.)

§ 115. **Return—When and to Whom Made.**—

The summons should be returned as soon as all the defendants have been served. It may not be necessary for any purpose that it should be returned on the same day, but the clerk's office is the proper place for all process after service and where all the parties interested have reason to look for it, in the absence of any statute to the contrary. If the officer is instructed to serve only a portion of the defendants, and there are others to serve elsewhere, the summons should be delivered to the plaintiff or his attorney, to enable him to secure service on the others.

In California, Idaho, Montana, Nevada, and Utah, no time is fixed for the return of summons, but when it is served by the sheriff, it must be returned, with his certificate of service, to the office of the clerk from which it issued. In all cases the service should be made promptly and return be made without delay; and

such is the statutory requirement in some states. Unless otherwise required by statute, as in Colorado, where the summons may be returned "to the attorney who issued the same," the return should be made to the clerk of the court. In Colorado it is to be returned "to the clerk or attorney who issued the same." In Oregon the summons must be returned by the first day of the next term of court, after its delivery to the officer for service.

Arizona. Sec. 699 Revised Statutes, 1887.

California. Sec. 410 Code Civil Procedure, Sec. 4176 Political Code.

Colorado. Sec. 37 Code Civil Procedure.

Idaho. Sec. 4143 Revised Statutes, 1887.

Montana. Sec. 71 Code Civil Procedure.

Nevada. Sec. 3050 General Statutes, 1885.

Oregon. Sec. 54 I Hill's Codes, 1892.

Utah. Sec. 267 Code Civil Procedure.

§ 116. **Form of Return.**—The return of the officer should be in the form of a certificate showing the name of the person served, together with the date of service, county where served, and that a copy of the complaint was also served, when such service is necessary. If any of the persons cannot be found, upon whom service is required to be made, the certificate should show that the sheriff has made diligent search within his county but is unable to find the person, naming or otherwise properly designating him, or stating the appropriate facts. The return should show clearly that those acts have been done which the statute requires in making service. If the service is required to be made by a person of a certain age, the return should show that the person was of that age at the

time of making the service. (*See Sheriff's and Constables' Forms, Chap. XXXI, post.*)

In case of service upon minors, the return should be sufficiently explicit to show, for instance, in California, that not only a copy of the summons had been delivered to each minor, but that in addition thereto a copy was delivered to the father, or mother, or guardian, etc., for each minor. There are no means of avoiding the provision of the code which requires service of summons upon infant defendants. The court acquires jurisdiction of the persons of infant defendants, so as to authorize the appointment of a guardian *ad litem* for them, only by service of summons upon the infants. The same rule of strictness applies in the case of the service of corporations and persons of unsound mind. (*See Sections 104 and 110, ante.*)

In making service of a summons, and in the return of such service, the provisions of the statute must be, and must be shown to have been, substantially observed and followed by the officer, otherwise the proceedings cannot be supported upon a direct appeal taken. (*People vs. Bernal, 43 Cal. 385.*)

A reference to the various code and statutory provisions as to proof of service of summons, both by an officer and by private persons, is here given.

Arizona. Secs. 706, 709 Revised Statutes, 1887.

California. Sec. 415 Code Civil Procedure.

Colorado. Secs. 40, 43 Code Civil Procedure.

Idaho. Sec. 4148 Revised Statutes, 1887.

Montana. Sec. 71 Code Civil Procedure.

Nevada. Secs. 3055-6 General Statutes, 1885.

Oregon. Sec. 61 1 Hill's Codes, 1892.

Utah. Sec. 273 Code Civil Procedure.

Washington. Sec. 178 11 Hill's Codes, 1891.

§ 117. **True Name to be Given.**—The return of the officer should show the true name of the defendant served; and, to ascertain the true name, he should ask the party served if the name designated in the summons is his true name. If the name in the summons is Alfred Brown, and the true name of the defendant is Albert Browne, he should return that he served the summons on Alfred Brown, the within-named defendant, whose true name is Albert Browne.

§ 118. **Insufficient Evidence of Service.**—In *O'Brien vs. Shaws Flat & T. C. Co.*, 10 Cal. 343, where the return of the sheriff showed that he served the summons “upon James Street, one of the proprietors of the company,” the court held it was not sufficient evidence of service to give the court jurisdiction, and that the summons might, with as much propriety, have been served upon any stranger.

A summons from a justice's court was addressed to defendants Adams & Co. The constable returned that he had served it “by leaving a copy thereof with Captain Charles B. Macy,” with the date. Judgment by default thereon was held bad. The court said the justice could, with as much propriety, have entered judgment on a certificate of service upon any other person. (*Adams vs. Towne*, 3 Cal. 247.) The sheriff's return that the summons was served on one of the members is *prima facie* evidence of that fact. (*Wilson vs. Spring Hill Co.*, 10 Cal. 445.)

§ 119. **Variation of Name—Idem Sonans.**—When the service is required to be made upon “Arthur” P., a return showing service upon “A.” P. is insufficient. (*Waterman vs. Phinney*, 1 Wash. 415.)

The question of *idem sonans* is one of pronunciation, not of spelling. A return of service upon "Rose" K., "one of the defendants," is sufficient to support a default against "Rosa" K., the names being substantially the same and the identity *prima facie* established. (*Galliano vs. Kilfoy*, 94 Cal. 86.)

§ 120. **Informal Return—Presumptions.** —

Where the return on a summons states that a copy of the summons was personally served on the defendant in the action, giving the time and place, this return, although informal, is held in *Drake vs. Duvenick*, 45 Cal. 455, to be sufficient to give the court jurisdiction of the person, so that the judgment is not void for want of jurisdiction, when collaterally attacked. Also, held that while such return does not show that a copy of the complaint was not delivered to the defendant personally, it has at least some legal tendency to prove that it was so delivered. Also, that if, in such a case, there is more than one defendant, the fact that the return does not state that a copy of the complaint was served with the summons, does not render the judgment void in a collateral attack.

The following return was held to be good in the case of *Cardwell vs. Labichi*, 59 Cal. 490: "I hereby certify that I have served the within summons by delivering a copy thereof, together with true copy of complaint, personally, at the township and county of Los Angeles, this twenty-fifth day of April, 1879. W. Bettis, constable," etc. It will be observed that this return fails to state upon whom summons was served, but as there was but one defendant, the court could determine that the service was made upon him. Nor does it state that the copy of complaint delivered was a copy of

the complaint in the action mentioned in the summons. It also fails to state that the service was personal, but only that the officer acted in person. The return was held to be sufficient proof of service; as, whatever may be the difference between superior and inferior courts, with reference to presumptions indulged in their favor, there is none between sheriffs and constables (*Political Code, Sec. 4315*); and the return of a sheriff is *prima facie* evidence of the facts stated (*Political Code, Sec. 4178*); and by force of section 4315 the same effect is given to a constable's return.

§ 121. **General Return Sufficient.**—Where a general power of serving process is given to an officer, a general return is sufficient. (*McMillan vs. Reynolds, 11 Cal. 379*.) The following cases are also cited in point to prove the sufficiency of such a return: (*Cantley vs. Moody, 7 Port. (Ala.) 443; Lenoir vs. Broadhead, 50 Ala. 58; Holsinger vs. Dunham, 11 Ind. 346; Chandler vs. Miller, 11 Id. 382; Keithley vs. Borum, 3 Miss. 683; Crane vs. Brannan, 3 Cal. 195, 196.*)

In its opinion in the case of *Cardwell vs. Labichi (59 Cal., 490)*, the court cited Sec. 849, 411, and 415 of the Code of Civil Procedure, and Secs. 4315 and 4176 of the Political Code, and further said:—

“In *Legg vs. Stillman et al., 2 Cowan 418*, which was *certiorari* to a justice's court, the suit was by summons in the court below, and the return on the summons was as follows: ‘Personally served May 14, 1822. Fees, \$0.13. Thomas McKnight, Const.’ The return was held sufficient. In the case cited, the objection to the judgment was made in a collateral action, as in the case before us for decision. The judgment was adjudged valid. Our views in this case are in accord

with the ruling in *Legg vs. Stillman*, which ruling meets our approval. In the case cited, the time and manner of service were shown, and in this case, the time, manner, and place of service appear. In neither case is defendant mentioned, either by name or by being designated as defendant. As to the point that the return does not show that the copy of the complaint served was the copy of the complaint in the action of *Perry et al. vs. Wolfskill*, we have to say that we do not think it tenable. The return afforded some evidence that it was such copy, and we cannot say that the proof in this regard was not sufficient to authorize the justice to render a judgment by default. (*See Code Civil Procedure, Sec. 871; Drake vs. Duvenick, 45 Cal. 455.*)"

§ 122. **Return of Deputy Must be Made in Name of Sheriff.**—The return of a deputy sheriff, on a process served, is a nullity, unless made in the name of the sheriff. (*Rowley vs. Howard, 23 Cal. 402.*) A summons was served by a deputy sheriff, and returned with the following signature to the return: "Elijah T. Cole, D. S." It was held that this return was insufficient to give the court jurisdiction, or authorize him to enter a default judgment.

§ 123. **Return When Not Served by Officer.**—An affidavit of service of summons in California by a person other than the sheriff should state that such person was over the age of eighteen at the time of such service, and not a party to the action. (See also section 102, *ante.*)

§ 124. **Sheriff's Return Not Traversable.**—The return of the sheriff upon process or notices is *prima facie* evidence of the facts in such return stated

(*California. Sec. 4178 Political Code*); and, held in *Egery vs. Buchanan*, 5 Cal. 56, that a sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion. While the courts may sometimes, under certain circumstances, overlook irregularities in officers' returns, they will not do so in all cases. The language of the law relating to the service of process should be closely studied, its directions strictly followed, and the return should be made in strict accordance with the acts performed, as expressed in the statutory directions laid down for the officer's observance. Yet, while it is advisable in all cases to literally comply with the provisions of the law, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it.

"Its provisions and all proceedings under it are to be liberally construed with a view to effect its object and to promote justice." (*Sec. 4 Code of Civil Procedure.*) For example: In California the name of the plaintiff's attorney must be indorsed on the summons (*Sec. 407 Code Civil Procedure.*) In the case of *Shinn vs. Cummins* (2 W. C. Rep. 216), where the name of plaintiff's attorney appeared on the face and not on the back of the summons, it was held that defendant was not prejudiced by plaintiff's failure to literally comply with the statute.

§ 125. **No Service after Return.**—Where a summons has been returned, it is *functus officio*, and subsequent service on defendant of a copy made by plaintiff from the files of the court is a nullity. (99 Cal. 336.)

After a summons has been served on some of the defendants and returned, it is competent for the court

to order it delivered to the plaintiff for further service on other defendants in the same or another county. (*Hancock vs. Pruess*, 40 Cal. 572.)

§ 126. **Erasures in Return.**—Where the judgment of the court recites that the summons was served on the defendant, the fact that, years afterward, there appears some erasure or interlineation on the sheriff's return, is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud, or forgery or alteration. (*Gregory vs. Ford*, 14 Cal. 138.)

§ 127. **Correction of Return.**—The sheriff may correct and may be compelled to correct a defective return, but not to alter a return which is regular on its face. (*Washington M. Co. vs. Kinnear*, 1 Wash. 99.)

§ 128. **Amended Summons—Service of.**—Where an amended complaint is filed before the defendants have been brought into court and an amended summons issued, a statutory provision requiring an amended complaint to be "served on the defendants affected thereby" (*Sec. 432 Code Civil Procedure, Cal.*), does not require a mode of service of summons differing from other cases. (*Dowling vs. Comerford*, 99 Cal. 204.)

§ 129. **Criminal Summons against Corporation.**—In California, provision is made for criminal proceedings against a corporation, by the issuance of a summons after information or presentment. The form of the summons and the time and manner of service are also prescribed. (*Secs. 1390-1392 Penal Code.*)

Idaho. Secs. 8222-4 *Revised Statutes*, 1887.

Utah. Secs. 471-2 *Code Criminal Procedure*.

§ 130. **Summons in Justices' Courts.**—The practice as to contents, issuance, and service of summons in justices' courts differs greatly in different states. A reference to some of the statutes and code provisions is here given.

Arizona. Secs. 1412-1416 *Revised Statutes*, 1887.

California. Secs. 844-849 *Code Civil Procedure*.

Colorado. Secs. 2636-9 *Mills' Ann. St.*, 1891.

Idaho. Secs. 4651, 4656, 4660 *Rev. Stats.*, 1887.

Montana. Sec. 742-744 *Code Civil Procedure*.

Nevada. Secs. 3540, 3541 *General Statutes*, 1885.

Oregon. Secs. 2059-2061 *I Hill's Codes*, 1892.

Utah. Secs. 343, 344, 372 *Code Civil Procedure*.

Washington. Secs. 1453-1462 *II Hill's Codes*.

§ 131. **Service outside the County.**—When a summons, issued by a justice of the peace, is to be served out of the county in which it was issued, the summons must have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons. The copy of summons served by the officer should have attached to it a copy of such certificate. (*California.* Sec. 849 *Code Civil Procedure*.)

§ 132. **Unauthorized Service Set Aside.**—When a summons in a justice's court action is served outside of the county, contrary to the statute, the justice of the peace may entertain a motion to set aside the service, such motion being made upon affidavits showing the grounds. (*History Co. vs. Light*, 97 Cal. 56.)

CHAPTER V.

SUBPŒNAS AND CITATIONS.

- § 133. Subpœna for Witness Defined.
- § 134. Civil Subpœna—By Whom Issued.
- § 135. Issuance by Justice of Peace.
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- § 153. Expenses of Witnesses.
- § 154. Citation Defined.
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§ 133. **Subpœna for Witness Defined.** "The process by which the attendance of a witness is required is a subpœna. It is a writ or order directed to a person and requiring his attendance at a particular time and

place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence," in which last case it is termed a subpœna *duces tecum*. (*California. Sec. 1985 C. C. P.*)

CIVIL SUBPŒNA.

§ 134. **Civil Subpœna By Whom Issued.**—A subpœna in a civil action or proceeding is issued as follows:—

"1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending.

"2. To require attendance out of the court, before a judge, justice or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice or any other officer before whom the attendance is required.

"3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpœna directed the attendance of the witness before their courts in a matter pending therein." (*California. Sec. 1986 Code Civil Procedure.*)

§ 135. **Issuance by Justice of Peace.**—"Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county." (*California. Sec. 919 C. C. P.*)

§ 136. **May Be Issued with Blank.**—"The summons, execution and every other paper made or issued by a justice, except a subpœna, must be issued without a blank left to be filled by another, otherwise it is void." (*California. Sec. 920 Code Civil Procedure.*)

§ 137. **How Served.—Witness Fees.**—"The service of a subpœna (in civil proceedings) is made by showing the original and delivering a copy, or a ticket containing its substance to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person." (*California. Sec. 1987 C. C. P.*)

In California witnesses are allowed, for attending in any civil suit or proceeding, before any court of record, referee, commissioner or justice of the peace, for each day, \$2.00; for traveling to the place of trial, for each mile, twenty cents, excepting for witnesses before a justice of the peace in Monterey County, in civil cases, who are entitled to \$2.00 per day, but no mileage. In case of impeachment and contested elections, for traveling to the place of trial, ten cents per mile. (*Statutes 1869 70, pp. 178 9.*)

"Witnesses summoned to testify on behalf of the

county in matters of public concern before the Board of Supervisors are not entitled to have their fees prepaid; but the Board must allow them reasonable compensation for the expenses of their attendance." (*Secs. 32, 33 Co. Govt. Act, Stats. 1893, p. 361; Sec. 4069 Political Code.*)

§ 138. **Failure to Pay or Tender Witness Fees.**—No person shall be obliged to attend and testify in a civil action, unless his fees shall have been tendered, or he shall have not demanded the same. (*California. Sec. 1987 Code Civil Procedure.*)

§ 139. **Witness on Behalf of the State.**—Sections 43 and 44 of an Act to Regulate Fees, approved March 5, 1870 (California) provides as follows:—

"The attorney general, or any district attorney, is authorized to cause subpœnas to be issued, and compel the attendance of witnesses on behalf of the State, without paying or tendering fees in advance, to either officers or witnesses; and any witness refusing or failing to attend, after being served with a subpœna, may be proceeded against, and shall be liable in the same manner as is provided by law in other cases where fees have been tendered or paid.

"The clerk of any court before which any witness shall have attended on behalf of the State, in any civil action, shall give to such witness a certificate, under seal, of travel and attendance, which shall entitle him to receive the same from the State treasury on the controller's warrant." (*California. Statutes 1869-70, p. 180.*) See also *Sec. 1326 Penal Code.*

§ 140. **Production of Prisoner as Witness.**—
"If the witness be a prisoner, confined in a jail or

prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows: (1) By the court itself in which the action or special proceeding is pending, unless it be a Justice's Court; (2) by a justice of the Supreme Court, or a judge of the Superior Court of the county where the action or proceeding is pending, if pending before a Justice's Court, or before a judge or other person out of court. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases, his examination, when allowed, must be taken upon deposition." (*California. Secs. 1995-7 Code Civil Procedure.*)

§ 141. **Witness before Supervisors.**—In California, provision is made for the issuance of a subpœna by the chairman of the Board of Supervisors, commanding the witness to appear before the board. This subpœna is to be served by the sheriff, and for disobedience thereto the witness may be arrested by attachment issued by a judge of the Superior Court, who may impose the same penalties as in case of a witness subpœnaed to appear and give evidence on the trial of a civil cause before a Superior Court. (*California. Secs. 28, 29 Co. Govt. Bill.*)

§ 142. **Witness out of County—Attendance.**—
"A witness is not obliged to attend as a witness before

any court, judge, justice, or any other officer, out of the county in which he resides (in civil proceedings), unless the distance be less than thirty miles from his place of residence to the place of trial." (*California. Sec. 1989 Code Civil Procedure.*)

§ 143. **Concealed Witness.**—"If a witness is concealed in a building or vessel, so as to prevent the service of a subpœna upon him, any court or judge, or any officer issuing a subpœna, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpœna; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed." (*California. Sec. 1988 Code Civil Procedure.*)

§ 144. **Witnesses Protected from Arrest.**—"Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom." (*California. Sec. 2067 Code Civil Procedure.*)

§ 145. **When Arrest of Witness Is Void.**—"The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving

the witness with a subpœna, for the damages sustained by him in consequence of the arrest." (*California. Sec. 2068 Code Civil Procedure.*)

§ 146. **Liability of Officer for Detention of Witness.**—"An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating:—

"1. That he has been served with a subpœna to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance and the action or proceeding in which the subpœna was issued; and,

"2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

"3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna.

"The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested." (*California. Sec. 2069 Code Civil Procedure.*)

§ 147. **Discharge of Witness from Arrest.**—The court or officer issuing the subpœna, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made during the time he is exempt (*Sec. 144 ante*). If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. (*California. Sec. 2070 Code Civil Procedure.*)

§ 148. **Arrest and Commitment for Contempt.**
 —“Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpœna or requiring the witness to be sworn;” and “every warrant to arrest or commit a witness must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the Superior Court.” (*California. Secs. 1991, 1994 Code Civil Procedure.*)

CRIMINAL SUBPŒNA.

§ 149. **Criminal Subpœna—By Whom Issued.**
 —In California, a subpœna in any criminal proceeding may be signed and issued by:—

“1. A magistrate before whom an information is laid, for witnesses in the State, either on behalf of the people or of the defendant.

“2. The district attorney, for witnesses in the State, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

“3. The district attorney, for witnesses in the State, in support of an indictment to appear before the court in which it is to be tried.

“4. The clerk of the court in which the indictment is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpœnas, subscribed by him as clerk, for witnesses in the State, as the defendant may require.” (*California. Sec. 1326 Penal Code.*)

§ 150. **By Whom and How Served.**—"A subpœna may be served by any person, but a peace officer must serve in his county any subpœna delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally and informing him of its contents." (*California. Sec. 1328 Penal Code.*)

§ 151. **Production of Prisoner as Witness.**—In California, provision is made for the removal of a prisoner from the State prison or the county jail of another county upon order of any court of record or judge thereof when his testimony is required in a criminal action; and the sheriff is required to execute such order. (*Sec. 1333 Penal Code.*)

§ 152. **Witness out of County—Attendance.**—"No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpœna, unless the judge of the court in which the offense is triable, or a justice of the Supreme Court, or a Superior Court judge, upon an affidavit of the district attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material and his attendance at the examination or trial necessary, shall indorse on the subpœna an order for the attendance of the witness." (*California. Sec. 1330 Penal Code.*)

§ 153. **Expense of Witnesses.**—"When a person attends before a magistrate, grand jury, or court, as

a witness in a criminal case, upon a subpœna, or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of the witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness." (*California. Sec. 1329 Penal Code.*)

CITATION.

§ 154. **Citation Defined.**—A citation is a direction issued by the clerk of a court of record under seal of the court, requiring the person cited to appear at a time and place specified. (*California. Sec. 1707 Code Civil Procedure.*)

§ 155. **Service of Citation.**—A citation must be served in the same manner as a summons in a civil action, and must be served at least five days before the return day thereof. (*California. Secs. 1709, 1711 Code Civil Procedure.*)

CHAPTER VI.

ARREST AND BAIL.

- § 156. Restrictions upon Imprisonment in Civil Actions.
- § 157. Arrest for Fraud.
- § 158. The Order of Arrest.
- § 159. Temporary Exemptions from Arrest.
- § 160. Remedy, when Applicable.
- § 161. Void Order of Arrest.
- § 162. Service of Order of Arrest.
- § 163. Sheriff's Expenses.
- § 164. Failure to Pay Expenses.
- § 165. When Defendant May Be Discharged.
- § 166. Surrender of Defendant.
- § 167. Liability of Sheriff and Sureties.
- § 168. Liable for Permitting an Escape.
- § 169. Liable for a Rescue.
- § 170. No Action for Escape or Rescue after Recapture.
- § 171. Exception to Sureties.
- § 172. Justification of Sureties.
- § 173. Deposit of Bail Money.
- § 174. Sheriff Liable for Escape.
- § 175. Discharge Final.

§ 156. **Restrictions upon Imprisonment in Civil Actions.** The constitutions of nearly all the states contain a provision similar to that in the declaration of rights of the Constitution of California, to wit: that "no person shall be imprisoned for debt in any civil action, on mesne or final process, except in cases

of fraud, nor in civil actions for torts, except in cases of willful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

(*California. Art. I, Sec. 15 Constitution.*)

Colorado. Constitution, Art. II, Sec. 12.

Nevada. Constitution, Art. I, Sec. 14.

Montana. Constitution, Art. III, Sec. 12.

Oregon. Constitution, Art. I, Sec. 19.

Washington. Constitution, Art. I, Sec. 17.

§ 157. **Arrest for Fraud.**—Provision is usually made by statute, more or less similar to that in force in California, which provides for the arrest of the defendant in a civil suit, in the following cases: "(1) In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State with intent to defraud his creditors; (2) in an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment, or for a willful violation of duty; (3) in an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff; (4) when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the

action is brought; (5) when the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors." (*California. Sec. 479 Code Civil Procedure.*)

Colorado. Sec. 246 Code Civil Procedure.

Idaho. Sec. 4241 Revised Statutes, 1887.

Montana. Sec. 121 Code Civil Procedure.

Nevada. Secs. 3095, 3542 General Statutes, 1885.

Oregon. Sec. 108 I Hill's Codes, 1892.

Utah. Sec. 352 Code Civil Procedure.

Washington. Sec. 229 II Hill's Codes.

§ 158. **The Order of Arrest.**—The order for the arrest must be obtained from the judge of the court in which the action is brought, and is made upon the affidavit of the plaintiff or some other person; and must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum. (*California. Secs. 480-483 Code Civil Procedure.*) Compare:

Colorado. Sec. 246 Code Civil Procedure.

Idaho. Secs. 4242-3 Revised Statutes, 1887.

Montana. Secs. 122-3 Code Civil Procedure.

Nevada. Secs. 3096-8, 3543 General Statutes, 1885.

Oregon. Sec. 109 I Hill's Codes, 1892.

Utah. Secs. 353-4 Code Civil Procedure.

Washington. Secs. 228-232 II Hill's Codes.

§ 159. **Temporary Exemptions from Arrest.**—In California, the constitution provides that "electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom" (*Art. II, Sec. 2*), and that

"members of the Legislature shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest, and shall not be subject to any civil process during the session of the Legislature, nor for fifteen days next before the commencement and after the termination of each session." (*Art. IV, Sec. 2.*)

"No person belonging to the military forces is subject to arrest on civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty." (*California. Sec. 2021 Political Code.*)

"Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom." (*California. Sec. 2067 Code Civil Procedure.*)

More or less similar provisions exist also in other States. Compare:

Arizona. Sec. 1830 Revised Statutes, 1887.

Colorado. Const. Art. VII, Sec. 5; Art. V, Sec. 16.

Idaho. Sec. 492 Revised Statutes, 1887.

Nevada. Sec. 3423 General Statutes, 1885.

Oregon. Secs. 619, 620 Hill's Codes, 1892.

Utah. Sec. 3960 Compiled Laws, 1888.

§ 160. **Remedy, When Applicable.**—To entitle the party to the remedy of arrest, it is not necessary that he should know the commission of a fraud. It is sufficient, if the circumstances detailed would induce a reasonable belief that a fraud was intended. (*Southworth vs. Resing, 3 Cal. 377.*)

A fraud merely constructive, not involving moral guilt, is not ground of arrest. A partner is not liable to arrest on the ground of fraud committed by his co-partners in contracting the partnership debt on which the action is brought, in the absence of proof that he knew of such fraud, or that he in some way ratified the transaction. But an officer is not presumed to know the nature of the evidence relied upon by the plaintiff to prove his case; it is sufficient for him to know that the process is regular on its face, to warrant him in serving it. Whatever may be the defect in the affidavit upon which the order of arrest is issued, the order itself, if regular on its face, will protect the officer in executing it. It was so held in *Dusy vs. Helm*, 59 Cal. 189, and section 4187 of the Political Code was cited by the court as statutory authority for the decision.

§ 161. **Void Order of Arrest.**—Where the complaint was not filed until two days after an order of arrest had issued thereon, it was held in *Ex parte Cohen*, 6 Cal. 318, that the order of arrest was void.

§ 162. **Service of Order of Arrest.**—Upon receipt of an order of arrest, with a copy of the affidavit, upon which it is made, the sheriff must arrest the defendant and keep him in custody until discharged by law. On making the arrest, the officer must deliver to the defendant a copy of the affidavit, and also, if he desire it, a copy of the order of arrest. (*California. Sec. 484 Code Civil Procedure.*)

Nevada. Secs. 3100-1, 3544-46 General Statutes, 1885.

Oregon. Sec. 109 1 Hill's Codes, 1892.

Washington. Secs. 236-7 II Hill's Codes.

§ 163. **Sheriff's Expenses.**—In California it is provided by the Penal Code that “whenever a person is committed upon process in a civil action or proceeding, except when the people of this State are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing, and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or order of court.” (*Sec. 1612 Penal Code.*)

The Code of Civil Procedure also provides that “whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor.” (*Sec. 1154 C. C. P.*)

Nevada. Sec. 3844 General Statutes, 1885.

Oregon. Sec. 128 I Hill's Codes, 1892.

Washington. Sec. 237 II Hill's Codes.

§ 164. **Failure to Pay Expenses.**—If a judgment is rendered against a defendant in a civil action, convicting him of fraud, and he is imprisoned on an execution issued thereon, the failure of the plaintiff to make a weekly advance to the jailer, of money suffi-

cient for the support of the prisoner, does not *per se* operate a discharge of the defendant. If the prisoner is adequately supported by the jailer, and the latter is willing to trust the creditor for reimbursement, the purpose of the statute is satisfied. (*Ex parte Lamson*, 50 Cal. 306.)

§ 165. **When Defendant May Be Discharged.**

—The sheriff may discharge the defendant at any time upon written instructions to that effect, signed by the plaintiff. And the defendant, at any time before execution, must be discharged from the arrest either upon giving bail, as required by the statute, or upon depositing the amount mentioned in the order of arrest. (*California. Sec. 486 Code Civil Procedure.*) A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. (*Soule vs. Hayward*, 1 Cal. 345.)

Idaho. Sec. 4248 Revised Statutes, 1887.

Montana. Sec. 128 Code Civil Procedure.

Nevada. Secs. 3102, 3113, 3548 Gen. Stats. 1885.

Oregon. Secs. 110, 129, 131 I Hill's Codes, 1892.

Utah. Sec. 359 Code Civil Procedure.

Washington. Secs. 238, 248 II Hill's Codes, 1891.

§ 166. **Surrender of Defendant.**—At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so.

A certified copy of the undertaking may be obtained from the clerk of the court in which the action is brought. (*California. Secs. 488-9 Code Civil Procedure.*)

Idaho. Secs. 4250-1 Revised Statutes, 1887.

Montana. Secs. 130-1 Code Civil Procedure.

Nevada. Secs. 3104-5 General Statutes, 1885.

Oregon. Secs. 112-3 I Hill's Codes, 1892.

Utah. Secs. 361-2 Code Civil Procedure.

Washington. Secs. 239, 240 II Hill's Codes, 1891.

§ 167. **Liability of Sheriff and Sureties.**—

Where a defendant has been allowed to go at large on bail, and an attempt is made to surrender him, either by himself or by his sureties, the officer should take heed lest he make himself liable to the plaintiff by receiving the defendant into custody and thereby exonerate the sureties. In the case of *Allen vs. Breslauer*, 8 Cal. 552, in an action on a bail bond executed by the defendants as sureties for one Pinover, the plaintiff obtained judgment against Pinover. There was no surrender of defendant, nor any execution issued within ten days after judgment. After the expiration of ten days, an execution was issued against the body of Pinover, and placed in the hands of the sheriff. On the same day Pinover called on the sheriff, and offered to surrender himself in discharge of his sureties. But the sheriff, acting under plaintiff's instructions, refused to take him into custody. Afterwards, defendants went with Pinover to the sheriff, for the purpose of giving him in custody, when he refused to receive him. The court below entered judgment for plaintiff, but, on appeal, the Supreme Court reversed the judgment, filing an opinion which is here given in full:—

“The question presented is whether, under this state of facts, defendants are liable. We think not. The Legislature, when providing for the surrender of defendant within ten days after judgment, evidently contemplated that the plaintiff should take such measures as would authorize the officer to hold defendant in custody. ‘The law requires no man to do a vain thing,’ is a familiar maxim, and certainly it would be in vain to require a party to surrender to an officer having no power to detain him. The construction contended for by plaintiff would enable a defendant to release his sureties by a surrender before execution, and then at once be released on *habeas corpus*, on the ground that he was illegally in custody. Such a result was never intended by the Legislature, and we are of opinion that a surrender within ten days after execution is a sufficient compliance with the will of the Legislature. Judgment reversed.”

§ 168. **Liable for Permitting an Escape.**—“A sheriff who suffers the escape of a person arrested in a civil action, without the consent or connivance of the party in whose behalf the arrest or imprisonment was made, is liable as follows:—

“1. When the arrest is upon an order to hold to bail or upon a surrender in exoneration of bail before judgment, he is liable to the plaintiff as bail.

“2. When the arrest is on an execution or commitment to enforce the payment of money, he is liable for the amount expressed in the execution or commitment.

“3. When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained.

“4. Upon being sued for damages for an escape or

rescue, he may introduce evidence in mitigation and exculpation." (*California. Sec. 99 Co. Govt. Bill, Statutes 1893, p. 372; Sec. 4182 Political Code.*)

§ 169. **Liable for a Rescue.**—The sheriff is liable for a rescue of a person arrested in a civil action equally as for an escape. (*California. Sec. 100 Co. Govt. Bill, Statutes 1893, p. 373; Sec. 4183 Political Code.*)

§ 170. **No Action for Escape or Rescue after Recapture.**—"An action cannot be maintained against the sheriff for a rescue, or for an escape of a person arrested upon an execution or commitment, if, after his rescue or escape and before the commencement of the action, the prisoner returns to the jail, or is retaken by the sheriff." (*California. Sec. 101 Co. Govt. Bill, Statutes 1893, p. 373; Sec. 4184 Political Code.*)

§ 171. **Exception to Sureties.**—"Within the time limited for that purpose, the sheriff must file the order of arrest with the clerk, with his return, together with a copy of the undertaking. The original undertaking he must retain, until the sureties justify, if they are required to do so. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court." (*California. Sec. 492 Code Civil Procedure.*)

Idaho. Sec. 4254 Revised Statutes, 1887.

Montana. Sec. 134 Code Civil Procedure.

Nevada. Sec. 3108 General Statutes, 1885.

Oregon. Sec. 116 I Hill's Codes, 1892.

Utah. Sec. 365 Code Civil Procedure.

Washington. Sec. 243 II Hill's Codes, 1891.

§ 172. **Justification of Sureties.**—"Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court, or county clerk, at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking." If the bail is found to be sufficient, the sheriff is thereupon exonerated from liability. (*California. Secs. 493, 496 Code Civil Procedure.*)

Idaho. Sec. 4255 Revised Statutes, 1887.

Montana. Sec. 135 Code Civil Procedure.

Nevada. Sec. 3109 General Statutes, 1885.

Oregon. Sec. 117 I Hill's Codes, 1892.

Utah. Sec. 366 Code Civil Procedure.

Washington. Secs. 244-7 II Hill's Codes, 1891.

§ 173. **Deposit of Bail Money.**—In case the amount of bail be reduced, the defendant may deposit such amount instead of giving bail. When money is deposited, the sheriff must give the defendant a certificate of the deposit made, discharge the defendant from custody, immediately pay the deposit into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. (*California. Secs. 497-8 Code Civil Procedure.*)

Idaho. Secs. 4259-60 Revised Statutes, 1887.

Montana. Secs. 139, 140 Code Civil Procedure.

Nevada. Sec. 3113 General Statutes, 1885.

Oregon. Sec. 121 I Hill's Codes, 1892.

Utah. Secs. 370-1 Code Civil Procedure.

Washington. Secs. 248-9 II Hill's Codes, 1891.

§ 174. **Sheriff Liable for Escape.**—"If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail, but he may discharge himself from such liability by the giving bail at any time before judgment." (*California. Sec. 501 Code Civil Procedure.*) See also *Sec. 4182 Political Code.*

§ 175. **Discharge Final.**—Where a party is once arrested and discharged, he cannot be arrested again in the same action. (*McGilvery vs. Moorhead, 2 Cal. 609.*)

CHAPTER VII.

CLAIM AND DELIVERY.

- § 176. Affidavit and Order to Sheriff.
- § 177. Taking the Property.
- § 178. Justification and Retaking Property.
- § 178a. Replevin from Officer Holding under Levy.
- § 179. Officer Responsible until Sureties Justify.
- § 180. Notice of Justification.
- § 181. Care of Property in Replevin.
- § 182. How Property Taken When Concealed.
- § 183. Plaintiff's Possession Only Temporary.
- § 184. Property to be Segregated.
- § 185. Claim of Property by Third Person.
- § 186. Sheriff Liable for Taking Property of Stranger.
- § 187. Bond of Indemnity to Sheriff.
- § 188. Correction of Valuation of Property.
- § 189. Form of Judgment.
- § 190. Judgment to be in the Alternative.
- § 191. When Judgment for Damages Alone Proper.
- § 192. Particular Description of Property.
- § 193. Partial Delivery of Property.
- § 194. Property Lost through Act of God.
- § 195. Attachment Lien in Replevin.
- § 196. Attempted Replevin from Sheriff.
- § 197. Issuance and Service on Holidays.

§ 176. **Affidavit and Order to Sheriff.**—The duties of sheriffs and constables in taking, keeping, and delivering property in replevin under the practice in California, which is substantially the same as pre-

vails throughout the Pacific States, are laid down in sections 609 to 620 of the Code of Civil Procedure.

The papers requisite to authorize the officer are: An affidavit made by the plaintiff or someone in his behalf showing that the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof; that the property is wrongfully detained by the defendant; the alleged cause of detention thereof, according to his best knowledge, information, and belief; that it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; the actual value of the property. The affidavit must have an indorsement thereon, in writing, by the plaintiff or his attorney, requiring the officer to take the property from the defendant. Besides the affidavit and notice referred to, there must be furnished to the officer a written undertaking executed by two or more sufficient sureties to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff. (*California. Secs. 510-2 Code Civil Procedure.*) Compare:

Arizona. Secs. 192, 194 Revised Statutes, 1887.

Colorado. Secs. 80, 81 Code Civil Procedure.

Idaho. Secs. 4272-4 Revised Statutes, 1887.

Montana. Secs. 157-9 Code Civil Procedure.

Nevada. Secs. 3122, 3124 General Statutes, 1885.

Oregon. Secs. 132-5 I Hill's Codes, 1892.

Utah. Secs. 383-5 Code Civil Procedure.

Washington. Secs. 255-7 II Hill's Codes, 1891.

§ 177. **Taking the Property.**—Upon receipt of the affidavit and notice and undertaking, the officer must indorse upon them the exact time of receipt, and sign his approval of the undertaking, and prepare a copy of each for service. No unnecessary time should then be lost in taking the property. If no property can be found, the officer runs no risk; while, on the other hand, if the property be taken, it need not be delivered to the plaintiff until the sureties on the undertaking shall have justified. “The sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody.” (*California. Sec. 512 Code Civil Procedure.*)

If the property is in the possession of any person other than the defendant or his agent, the officer will not be justified in taking it.

“He must, without delay, serve upon the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him, personally, if he can be found, or to his agent from whose possession the property is taken, or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest post office, directed to the defendant.” (*California. Sec. 512 Code Civil Procedure.*) Compare:

Arizona. Sec. 195 Revised Statutes, 1887.

Colorado. Sec. 81 Code Civil Procedure.

Idaho. Sec. 4274 Revised Statutes, 1887.

Montana. Sec. 159 Code Civil Procedure.

Nevada. Sec. 3124 General Statutes, 1885.

Oregon. Sec. 135 I Hill's Codes, 1892.

Utah. Sec. 385 Code Civil Procedure.

Washington. Sec. 257 II Hill's Codes, 1891.

§ 178. **Justification and Retaking Property.**

—Under the California practice, after the sheriff has taken property, “the defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest, and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify.” If the defendant does not except to the sureties he may retake the property as follows:—

“At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff,” unless it be claimed by a third person. (*California. Secs. 513-4 Code Civil Procedure.*)

Colorado. Sec. 82 Code Civil Procedure.

Idaho. Secs. 4275-6 Revised Statutes, 1887.

Montana. Secs. 160, 165 Code Civil Procedure.

Nevada. Sec. 3125 General Statutes.

Oregon. Sec. 136 I Hill's Codes, 1892.

Utah. Secs. 386-7 Code Civil Procedure.

Washington. Sec. 258 II Hill's Codes, 1891.

§ 178a. **Replevin from Officer Holding under Levy.**—When personal property, which has been levied upon by the sheriff, has been taken from him in replevin, by the party claiming it, he should consult his own safety and proceed no further in the matter, but rest securely on the bond given by the plaintiff in the replevin suit. He may give an undertaking and retake the property; but if he pursue this course, he and his sureties will be liable to the claimant for its value. Having subsequently sold the property under the execution, and paid the proceeds to the plaintiff in execution, he may eventually be compelled to pay its value to the claimant.

§ 179. **Officer Responsible until Sureties Justify.**—If the defendant elect to retake the property, the officer is still to retain it until the defendant's sureties justify; unless, indeed, he is willing himself to take the risk of such justification. The effect of a demand of the property by the defendant is not to entitle the defendant to have the property delivered to him, but to prevent a delivery of the property to the plaintiff. If the defendant would have the property himself, he must proceed to have his sureties justify. The property must be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. (*California. Sec. 515 Code Civil Procedure.*)

§ 180. **Notice of Justification.**—“The defendant's sureties, upon notice to the plaintiff of not less than two and not more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is

responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff." (*California. Sec. 515 Code Civil Procedure.*)

Idaho. Sec. 4277 Revised Statutes, 1887.

Montana. Sec. 166 Code Civil Procedure.

Nevada. Sec. 3127 General Statutes, 1885.

Oregon. Sec. 138 I Hill's Codes, 1892.

Utah. Sec. 388 Code Civil Procedure.

Washington. Sec. 260 II Hill's Codes, 1891.

§ 181. **Care of Property in Replevin.**—When the property is taken by the officer he must exercise the same care in keeping it as in holding property under attachment, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.

§ 182. **How Property Taken When Concealed.**—"If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county." (*California. Sec. 517 Code Civil Procedure.*)

Colorado. Sec. 86 Code Civil Procedure.

Idaho. Sec. 4279 Revised Statutes, 1887.

Montana. Sec. 168 Code Civil Procedure.

Nevada. Sec. 3129 General Statutes, 1885.

Oregon. Sec. 140 I Hill's Codes, 1892.

Utah. Sec. 390 Code Civil Procedure.

§ 183. Plaintiff's Possession Only Temporary.

—The possession obtained by plaintiff in replevin is only temporary. It does not divest the title, or discharge the lien. (*Hunt vs. Robinson*, 11 Cal. 262.)

§ 184. Property to be Segregated.—Replevin only lies for the recovery of specific personal property. Property which has not been set apart from the mass in which it is included is not specific property, and cannot be reached by an action of replevin. Just what will constitute a segregation must depend upon the circumstances of each particular case.

A safe in the possession of McC. belonging to W. F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hundred dollars belonged to W. F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized eighteen hundred dollars of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: *Held*, that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff. (*Griffith vs. Bogardus*, 14 Cal. 410.)

§ 185. Claim of Property by Third Person.—

“If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify

the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant, or his agent, is valid against the sheriff unless so made." (*California. Sec. 519 Code Civil Procedure.*)

The action of replevin cannot be maintained, under our laws, against a sheriff to recover the possession of personal property held by him under a writ of replevin, unless a claim upon him for such property has been first made as above provided. But when a third party claims the property, the officer should demand indemnity at once from the plaintiff, for he can no more take the property of a stranger under replevin than he can under attachment or execution, without rendering himself liable.

Colorado. Sec. 88 Code Civil Procedure.

Idaho. Sec. 4281 Revised Statutes, 1887.

Montana. Sec. 170 Code Civil Procedure.

Nevada. Sec. 3131 General Statutes, 1885.

Oregon. Sec. 142 I Hill's Codes, 1892.

Utah. Sec. 392 Code Civil Procedure.

Washington. Sec. 264 II Hill's Codes, 1891.

§ 186. **Sheriff Liable for Taking Property of Stranger.**—Where an order of court directed the sheriff to seize certain specific property, and this property was proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. (*Rhodes vs. Patterson, 3 Cal. 469.*) And further, that the owner of property has his remedy and the right of recovery, against anyone, whether sheriff or not, unless it be held by legal process against himself.

In the case of *Bacon vs. Robson, 53 Cal. 399*, the court held that in an action to recover personal prop-

erty or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown. See also *Sec. 185*.

§ 187. **Bond of Indemnity to Sheriff.**—If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lott vs. Mitchell, 8 Cal. 23.*)

§ 188. **Correction of Valuation of Property.**—“When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made.” (*California. Sec. 473 C. C. P.*)

§ 189. **Form of Judgment.**—By section 667 of the Code of Civil Procedure of California, it is pro-

vided that, "if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same;" and similar provisions exist in other States.

Arizona. Secs. 202 4 Revised Statutes, 1887.

Colorado. Secs. 2755, 2761 Mills' Ann. Stats., 1891.

Idaho. Sec. 4453 Revised Statutes, 1887.

Montana. Sec. 303 Code Civil Procedure.

Nevada. Sec. 202 Code Civil Procedure.

Oregon. Sec. 262 I Hill's Codes, 1892.

Utah. Sec. 548 Code Civil Procedure.

Washington. Sec. 438 II Hill's Codes, 1891.

§ 190. Judgment to be in the Alternative.—

The judgment in replevin must be in the alternative form, *i. e.*, either for possession of the property or for damages, etc., even though the property has been delivered to the plaintiff. (*Brichman vs. Ross*, 67 Cal. 601.) See also Sec. 191.

§ 191. **When Judgment for Damages Alone Proper.**—When it appears on the trial in replevin that the property has been destroyed and cannot therefore be returned, a judgment for damages alone will not be reversed. (*Brown vs. Johnson*, 45 Cal. 76.)

§ 192. **Particular Description of Property.**—In replevin, where the judgment for the plaintiff describes the property to be restored as "buckwheat, valued at three hundred and sixty-five dollars and seventy-five cents," the description is insufficient to sustain the judgment, unless the judgment refer for a

fuller description to the complaint, and there is a more definite description in the complaint. (*Welch vs. Smith*, 45 Cal. 230.)

§ 193. **Partial Delivery of Property.**—When judgment in replevin was rendered for the possession of four hundred hogs or \$2,000, the value thereof, the sheriff, failing to find more than ninety-six hogs, properly levied on other property to make up the remainder of the judgment. (*Black vs. Black*, 74 Cal. 520.)

§ 194. **Property Lost through Act of God.**—It is no defense to an action upon a replevin bond that the property was lost through the act of God.

In the case of *De Thomas vs. Witherby*, 61 Cal. 92, the plaintiff pleaded that two cows known as graded stock died, thereby rendering it impossible for plaintiff to return said cattle to defendants. It was held that this was no defense. The court said:—

“In some of the cases to which we have been referred, it has been held that the plaintiff, who obtains the possession of personal property by replevin, is excused from returning the same in case it has died since the seizure, without any neglect or default on the part of the party taking it. This was the doctrine laid down by the Supreme Court of New York, in *Carpenter vs. Stevens*, 12 Wend. 589. . . . To the same effect is the case of *Melvin vs. Winslow*, 10 Me. 397. But an examination of more recent cases and later authorities convinces us that the above cases do not lay down the correct rule on this subject. . . . The weight of authority is manifestly against excusing the party who has replevined goods, from returning the same or responding in damages for their value, because they

have been lost by the act of God, and it appears to us that upon no sound principle can he be excused. A plaintiff not being the owner of goods who takes them out of the possession of the real owner, holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying such judgment under a plea that the property has been lost in his hands, even by the act of God."

§ 195. **Attachment Lien in Replevin.**—The question as to whether the lien of attachment continues after the replevy of goods is decided affirmatively by the Supreme Court in the case of *Hunt vs. Robinson*, 11 Cal. 262. This was an action against the sureties on a replevin bond, and the facts were as follows:—

Treadwell commenced suit against David Jones, by attachment, which was levied upon certain personal property by the plaintiff Hunt, as sheriff of Sacramento County. Mary Jones, wife of David Jones, claimed the property as a sole trader, and commenced her action of replevin, and obtained possession of the property, upon delivering the statutory undertaking executed by defendants, Robinson and Skinker. The replevin suit was decided on the 5th of February, 1855, in favor of Hunt, and a motion made for a new trial by Mrs. Jones, which motion was pending until March 9, 1855, when it was overruled. Treadwell obtained judgment

against David Jones, Nov. 30, 1854, for \$4,300. On the 18th of February, 1855, certain executions in favor of *other* creditors of David Jones being in the hands of the plaintiff Hunt, were levied by him upon the same property, and the property sold about the last of February. The sheriff, being in doubt as to which of the several creditors were entitled to the proceeds of the sale, paid the money into the Sixth District Court, and filed his bill of interpleader, making Treadwell and the other creditors parties. Upon the hearing, the District Court decided that the second class of creditors were entitled to the proceeds. From this decision no appeal was taken by any party. On March 17, 1855, Hunt issued his execution upon the judgment obtained by him in the replevin suit, which was returned by the coroner unsatisfied. The sheriff then brought his suit against the sureties in the replevin bond, and obtained judgment against them for the assessed value of the property replevied and for costs, and the defendants appealed.

The Supreme Court decided that the lien of Treadwell's attachment continued after the replevy of the goods by Mary Jones, and that when the same property came into the hands of Hunt, as sheriff, the condition of the replevin bond, to return the property, was fulfilled. The property was then liable to a second levy, but such second levy was subject to the levy under the prior attachment.

§ 196. **Attempted Replevin from Sheriff.**—The duties of the sheriff in case of a cross-suit in replevin are discussed and clearly laid down in the case of *Fleming vs. Wells*, 65 Cal. 336. In that case it was held by the court, on appeal from a judgment on the

pleadings, that the sheriff cannot be held responsible in replevin for property of the plaintiff, taken by him on a prior replevin suit and regularly delivered to the plaintiff in that suit, but that the plaintiff, as defendant in the first suit, should have given the statutory bond for redelivery instead of instituting an independent cross-action in replevin.

§ 197. **Issuance and Service on Holidays.**—

In some states express provision is made by statute for the issuance and service of the writ of replevin on holidays in certain cases.

Colorado. *Sec. 416 Code Civil Procedure.*

Montana. *Sec. 531 Code Civil Procedure.*

CHAPTER VIII.

INJUNCTION.

- § 198. How Served.
- § 199. By Whom Served.
- § 200. When May Be Served.
- § 201. Sheriff Must Obey Writ.

§ 198. **Injunction, How Served.**—In the absence of any statutory provision as to the manner of service of the writ of injunction, it is sufficient if service be made in the manner prescribed for service of summons. (*Golden Gate M. Co. vs. Superior Court*, 65 Cal. 187.) In California, when the injunction is granted upon the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction. (*Sec. 527 Code Civil Procedure.*) In Colorado and Oregon the statute provides for service of the injunction in the same manner as summons. In Washington a certified copy is served.

Colorado. Sec. 154 *Civil Code, Acts 1887, p. 145.*

Oregon. Sec. 410 *I Hill's Codes, 1892.*

Washington. Sec. 275 *II Hill's Codes, 1891.*

§ 199. **By Whom Served.** Although statutory provision is usually made that "the sheriff must serve

all process," etc., such a provision does not impose upon him exclusively such duty; and in the absence of any express statute designating the persons by whom an injunction is to be served, it may be served by any person authorized by law to make service of summons. (*Golden Gate M. Co. vs. Superior Court*, 65 Cal. 187.)

§ 200. **When May Be Served.**—Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days. (*California. Sec. 76 Code Civil Procedure.*)

Washington. Laws, 1891, p. 80.

§ 201. **Sheriff Must Obey Writ.**—Where a sheriff levies on and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sheriff, who in defiance of it afterwards makes the sale, he is a naked trespasser, and liable in damages—even though he be not a party to the injunction suit. It was so held in the case of *Buffandeau vs. Edmondson*, 17 Cal. 437, and that it was "unnecessary to consider whether the bill of complaint showed a proper case for an injunction, or whether the injunction was regularly granted or not. It was enough for the sheriff to know that a court of competent jurisdiction had made the order, and then it became his duty to obey it."

CHAPTER IX.

ATTACHMENT—GENERALLY.

- § 202. Nature and Object of the Writ.
- § 203. Issuance before Summons.
- § 204. Regularity of Writ.
- § 205. What the Writ Must State.
- § 206. Original Writ to be Kept in Sheriff's Office.
- § 207. Instructions to Sheriff.
- § 208. Attachment Void for Want of Proper Undertaking.
- § 209. Irregularity in Issuance of Attachment.
- § 210. Attachment Where the Debt Is Not Due.
- § 211. Contract Made Out of State.
- § 212. Right to Intervene.
- § 213. Receipt and Levy on Holiday.
- § 214. Attachment—Levy before Service of Summons.
- § 215. No Notice to Defendant Necessary.
- § 216. What May Be Levied upon.
- § 217. When Property Not Attachable.
- § 217a. Property in Custody of the Law.
- § 218. Attachment Lien—How Enforced.
- § 219. Attachment Not Affected by New Summons.
- § 220. Conflicting Attachments.
- § 221. Priority of Levy—Sheriff and Deputy.
- § 222. Inventory and Return of the Writ.
- § 223. What the Return Should Contain.
- § 224. Return When Not Amendable.
- § 225. Return on Second Writ.
- § 226. Preferred Labor Claims.
- § 227. Service of Notice.
- § 228. How Insolvency Proceedings Affect Attachment.

- § 229. Insolvency—Duties of the Sheriff.
- § 230. Void Levy upon Insolvent's Property.
- § 231. Dissolved Attachment Not Revived.

§ 202. **Nature and Object of the Writ.**—An attachment is a process under which the debtor's property may be seized and held as security for the satisfaction of any judgment that may be recovered against him in the action, unless he gives security for the payment of the judgment, in the manner provided by the statute. The object of the writ of attachment is to secure, in the interest of the plaintiff, sufficient property belonging to the defendant to satisfy the plaintiff's claim. The purpose of the lien is to secure the payment of the judgment, and this is accomplished by its holding the property until the judgment is rendered—and in case of real property, until the judgment is or may be docketed—so that the attached property may be taken and sold under an execution to be issued on the judgment. It enables the sheriff to seize the property of the debtor and to hold it until the court can determine the respective rights of the parties by a judgment. This being the object of the writ, it is clearly the duty of the officer to use all due diligence in the service thereof. Any delay on his part may defeat this object, and render him liable to the plaintiff for whatever loss may be thereby sustained.

§ 203. **Issuance before Summons Void.**—When the statute provides that the plaintiff "at the time of issuing the summons, or any time afterward, may have the property of the defendant attached," these provisions must be strictly followed, and the attachment, if issued before the summons, is a nullity. The issuance of the summons afterwards cannot cure that

which was void from the beginning. (*Low vs. Henry*, 9 Cal. 538.)

It is not presumed that a county clerk or a justice of the peace will issue a writ of attachment before the summons. Such a procedure could only arise through the grossest negligence, and would not be excusable upon any plea of confusion caused by haste or multiplicity of duties requiring immediate attention at the time of error. But if a sheriff receive information that no summons has been issued at the time the writ is placed in his hands, he will serve the writ at his peril.

§ 204. **Regularity of Writ.**—It is an old principle of law that, on the reception of a ministerial writ, it is the duty of the officer to obey its mandate, if it be regular on its face and issued by competent authority; if there be any irregularity in its issuance, which does not so appear, such irregularity affects the parties, but not the ministerial officer. It is incumbent upon the officer, therefore, before making service of process, to examine the same, and satisfy himself upon these points. (See also *Secs. 56, 352, 353, 377.*)

§ 205. **What the Writ Must State.**—Under the California Code provision (*Sec. 540 Code Civil Procedure*) "the writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the

undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case, to take such undertaking."

In other states the requirements of the writ are substantially the same. Compare :

Arizona. Sec. 50 *Revised Statutes*, 1887.

Colorado. Sec. 97 *Code Civil Procedure*.

Idaho. Sec. 4305 *Revised Statutes*, 1887.

Montana. Sec. 184 *Code Civil Procedure*.

Nevada. Sec. 3148 *General Statutes*, 1885.

Oregon. Sec. 147 *I Hill's Codes*, 1892.

Utah. Sec. 413 *Code Civil Procedure*.

Washington. Sec. 296 *II Hill's Codes*, 1891.

§ 206. **Original Writ to be Kept in Sheriff's Office.**—The officer should make the levy with a copy of the writ, leaving the original writ, in all cases, at his office. He need not give an attaching creditor notice of the levy of his attachment, nor need he serve a copy of the writ upon the defendant. The latter is entitled to a copy if he demand it, upon payment of the lawful fee therefor; but if the officer have no copy with him at the time, it may be delivered to him thereafter.

§ 207. **Instructions to Sheriff.**—The writ should be accompanied with written instructions directing the officer as to the property to be attached; and when the property is real property, the directions should state in whose name the property stands of record. The best form of instruction to the sheriff should contain such a description as would give satisfaction if contained in a deed; for, if the cause is prosecuted to judgment and

sale, and a deed pass to the purchaser, the description of the land given in the first proceeding will follow to the deed. Although the officer is bound to attach property belonging to the defendant without written instructions to do so, if he know of any that is not exempt within the county, yet, if such directions are not given, he may afterwards seek to excuse himself from neglect by pleading ignorance or uncertainty of ownership. Where specific instructions are given in writing, the party desiring the levy and the officer at once arrive at a mutual understanding as to the work to be done.

In California "no directions or authority by a party or his attorney, to a sheriff, in respect to the execution of process or return thereof, or to any act or omission thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing signed by the attorney of the party, or by the party, if he has no attorney." (*Sec. 4185 Political Code.*)

§ 208. **Attachment Void for Want of Proper Undertaking.**—Where the undertaking given on issuing an attachment from a justice's court was to the effect that plaintiff would pay all costs, etc., and the damages the defendant might sustain by reason of the attachment, "not exceeding one hundred dollars:" *Held*, that the undertaking was bad, and rendered the attachment void because not issued in substantial conformity with the provisions of the 553d section of the Practice Act. (*Hisler vs. Carr*, 34 Cal. 641.) In the same case it was held that where the affidavit failed to show that the plaintiff had a cause of action against defendant, the summons which was made returnable more than ten days from its date was void, as was also an attachment issued in the same case.

§ 209. **Irregularity in Issuance of Attachment.**—Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day and after other attachments on the same property, when it was signed by the clerk, with the name of the plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. (*Dixey vs. Pollock*, 8 Cal. 570.)

If an attachment be issued and levied in an action for a debt which has been secured by a mortgage, the case not being one in which the statute allows such writ, the attachment should be dissolved on proper motion. (*Kinsey vs. Wallace*, 36 Cal. 462.)

§ 210. **Attachment Where the Debt Is Not Due.**—An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it. But where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. The debt in such case is equitably due, and, there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself. (*Patrick vs. Montader*, 13 Cal. 435; *Davis vs. Eppinger*, 18 Cal. 379.)

§ 211. **Contract Made out of State.**—If a contract is not made in the State, there must be an express stipulation that it shall be paid in the State, in order to authorize the issuance of an attachment in an action upon it.

§ 212. **Right to Intervene.**—Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims. (*Coghill vs. Marks*, 29 Cal. 673.)

§ 213. **Receipt and Levy on Holiday.**—In the absence of a statutory authority, a writ of attachment placed in the hands of the sheriff on a holiday, cannot be officially received by him on that day. It can only be considered officially in his hands when the holiday has expired. (*Whitney vs. Butterfield*, 13 Cal. 335.)

In some States provision is made by statute for the issuance and levy of the writ of attachment on holidays, in certain specified cases.

Arizona. Sec. 652 Revised Statutes, 1887.

Colorado. Sec. 416 Code Civil Procedure.

Montana. Sec. 531 Code Civil Procedure.

Washington. Laws of 1891, p. 80.

§ 214. **Attachment—Levy before Service of Summons.**—Although the writ of attachment may not be issued before the summons, it may be served before the summons is served. The service of the summons cuts no figure in the attachment. The attachment cannot, but the summons may, be served by a private person.

§ 215. **No Notice to Defendant Necessary.**—The sheriff to whom the writ is directed and delivered must execute the same without delay if the statutory

undertaking be not given. The officer is not bound to look up the defendant to ascertain if he wishes to give the undertaking, nor would it be proper for him to delay executing the writ for that purpose.

§ 216. **What May Be Levied Upon.**—The statutory provisions in regard to attachment are broad enough to allow the levy of the writ, and provide a method of levying the writ, upon any property of the defendant, either real or personal, or any interest therein, not exempt from execution, or so much thereof as may be necessary to satisfy the demand sued on. Were this not the case, the writ would fall short of its plain object and purpose.

No property may be taken in attachment, however, that is not liable to seizure under the execution when issued, and the only way in which the levying of the attachment upon the property operates as security for the satisfaction of the anticipated judgment, is by its capacity to hold the property to await the execution to be issued. This is necessarily implied by the various statutory provisions for the sale of the attached property in case of judgment subsequently recovered.

Arizona. Secs. 56, 66 *Revised Statutes*, 1887.

California. Sec. 550 *Code Civil Procedure*.

Colorado. Sec. 110 *Code Civil Procedure*.

Idaho. Sec. 4315 *Revised Statutes*, 1887.

Montana. Sec. 194 *Code Civil Procedure*.

Nevada. Sec. 3157 *General Statutes*, 1885.

Oregon. Sec. 157 *I Hill's Codes*, 1892.

Utah. Sec. 423 *Code Civil Procedure*.

Washington. Sec. 312 *II Hill's Codes*, 1891.

§ 217. **When Property Not Attachable.**—An attaching creditor can acquire no greater right in the

attached property than the defendant had at the time of the levy. If it be so situated that he cannot dispose of it adversely to others, it cannot be attached for his debt. (*Ward vs. Waterman*, 85 Cal. 488; *Lowenberg vs. Greenebaum*, 99 Cal. 165.)

§ 217a. **Property in Custody of the Law.**—In the absence of a statute to the contrary, money in the hands of the sheriff, collected on execution, is in the custody of the law, and is not the subject of attachment or garnishment; and money in the hands of a receiver is not liable to seizure without an order from the court having charge thereof. (*Clymer vs. Willis*, 3 Cal. 363; *County of Yuba vs. Adams*, 7 Cal. 35.) In Washington, however, statutory provision is made for garnishment of money in the hands of sheriffs and constables. (See 306 *Hill's Codes*, 1891.)

§ 218. **Attachment Lien—How Enforced.**—The only mode provided by statute for enforcement of the attachment lien upon property held under the writ is by sale under execution, and payment of the proceeds of the sale and of all moneys derived from sale of perishable property and collected on garnishment. The proceeds of attached property sold under order of court by statutory authority forms no exception to the usual course of proceedings respecting property held under attachment, for the money in the officer's hands, though not required to be levied upon under execution, because not required to be sold, can be applied to the satisfaction of the judgment only when the plaintiff is entitled to an execution, and it is appropriated in the same manner as when made under the execution.

§ 219. **Attachment Not Affected by New Summons.**—In *Seaver vs. Fitzgerald*, 23 Cal. 86, in a suit commenced before a justice of the peace, it was held that if the summons be returned by the officer with his indorsement thereon that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but the magistrate may continue the case, issue a new summons, and make an order for its service by publication. In such case, when an attachment is regularly issued by the justice at the time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons and the issuance of a second one, nor is the validity of the attachment in any way affected by the proceedings. The plaintiff contended that the second summons was *the* summons in the case, because that was the summons served by publication, and as the writ of attachment was issued before this second summons, it was therefore void. The court held that this point was clearly untenable, that a summons was duly issued before or at the time of the issuing of the attachment, and the attachment was therefore valid when it issued. The fact that the defendant absented himself so that the summons could not be served on him before the return day thereof, and that it was returned not served, could not have the effect of vitiating the attachment.

§ 220. **Conflicting Attachments.**—The application of an attaching creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors,

may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. (*Dixey vs. Pollock*, 8 Cal. 570.)

A sheriff who receives an attachment, regular upon its face, cannot pay over the money obtained by him from the sale of the property, levied on by virtue of the writ, to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue. When a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. The sheriff has no right to go back of the process and raise the question as to the validity of the attachments. (*McComb vs. Reed*, 28 Cal. 281.)

If two attachments, issued from different courts, are placed in the sheriff's hands, and one is issued and levied before the other, and the sheriff levies on the same personal property by virtue of both, although the court from which the second attachment issued may make an order for the sale of the property, it has no power to dispose of the fund arising from the sale, other than the surplus remaining after the claim of the first attaching creditor is satisfied. In such case, if the sheriff obeys, and the money is paid to the second attaching creditor, the sheriff is liable to the first attaching creditor for the amount for which he recovers judgment, or for the amount of the proceeds, if less than the amount of the judgment. (*Weaver vs. Wood*, 49 Cal. 297.)

Where a first attachment against an insolvent is set

aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. Such a fund is not strictly an equitable asset. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. Plaintiff's costs, disbursements, and counsel fees, however, should first be deducted from the fund before distribution. (*Patrick vs. Montader*, 13 Cal. 435.)

§ 221. **Priority of Levy—Sheriff and Deputy.**—Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ—no special circumstances being shown. (*Whitney vs. Butterfield*, 13 Cal. 336.)

§ 222. **Inventory and Return of the Writ.**—In California, Colorado, Idaho, Montana, Nevada, Utah and Washington, the statute requires the sheriff to make a "full inventory" of the property attached and return the same with the writ. In Arizona the return must describe the property attached with sufficient certainty to identify it, and in Oregon the return of the writ must have the sheriff's proceedings indorsed thereon, which last necessarily demands a list of the property levied upon.

In California, Idaho, Montana, Nevada, Utah and Washington the sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after its receipt. In Colorado and Oregon the writ is to be returned within twenty days in any case, and in Oregon it is to be returned when it "shall be fully executed or discharged."

In computing the time, the day of its receipt is excluded and the last day included. The writ of attachment must not be returned until the last day, except by written instruction from the plaintiff or his attorney, or unless it has been fully satisfied. After having made a levy under the writ, the plaintiff may find other property which he desires to be attached, and if the writ has been returned, he may lose the opportunity to secure such other property, and the sheriff be held accountable therefor.

Arizona. Secs. 64, 65 *Revised Statutes*, 1887.

California. Secs. 546, 559 *Code Civil Procedure*.

Colorado. Sec. 114 *Code Civil Procedure*.

Idaho. Secs. 4311, 4324 *Code Civil Procedure*.

Montana. Secs. 191, 203 *Code Civil Procedure*.

Nevada. Secs. 3154, 3166 *General Statutes*, 1885.

Oregon. Sec. 162 *I Hill's Codes*, 1892.

Utah. Secs. 419, 432 *Code Civil Procedure*.

Washington. Secs. 308, 321 *Code Civil Procedure*.

§ 223. **What the Return Should Contain.** -

The sheriff's return upon process is a report of his proceedings thereunder. Where the language of the law, which requires him to do certain things in the service of process, is mandatory, he should make the wording of his return conform strictly to the requirements therein expressed, if he has faithfully followed

those requirements in making the service. It is the duty of the sheriff, when returning an attachment of real property, to indorse thereon what acts he performed in serving the writ, and it will be presumed that he states all that he did towards making the service. Care should be taken to include the inventory of attached property, mentioned in the preceding section. If he serve a garnishment upon A., who fails, neglects, and refuses to answer, and, subsequently, by direction of the plaintiff, he serve another garnishment upon A., who answers thereto that he has, or has not, money or goods belonging to the defendant, the officer must make return of both services. He must not take for granted that because no answer was made by A. to the first garnishment, it was a useless service, and that therefore no return need be made of that service, for it may be necessary for the plaintiff to show in subsequent proceedings that a copy of the writ and notice of garnishment had been served upon A. at the time the first service was made.

§ 224. **Return—When Not Amendable.**—A sheriff has no right, after making a return, to amend it so as to affect rights which have already vested. (*Newhall vs. Provost*, 6 Cal. 85.) The return on attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. (*Webster vs. Haworth*, 8 Cal. 21; *Newhall vs. Provost*, 6 Cal. 85.)

§ 225. **Return on Second Writ.**—When an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that

he has attached the interest of the defendant in the property then in his possession. (*O'Connor vs. Blake*, 29 Cal. 313.) While such a return may be only necessary, it would be proper and more satisfactory to parties interested who desire information regarding the officer's proceedings, to state in the return that the property was attached subject to levy under certain prior writs. The plaintiff should be enabled to ascertain, from the return on file in the clerk's office, what advantages he has gained under the writ; and where a return only states a portion of the officer's proceedings, it is liable to mislead.

§ 226. **Preferred Labor Claims.**—"In cases of executions, attachments and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding \$100. If any or all of the claims so presented, and claiming preference under this section, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the

officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim." (*California. Sec. 1206 Code Civil Procedure.*)

"The debtor or creditor intending to dispute a claim presented under the provisions of the last section (Sec. 1206) shall, within ten days after receiving notice of such claim, serve upon the claimant and the officer executing the writ, a statement in writing, verified by the oath of the debtor, or the person disputing such claim, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the writ. If the claimant bring suit on a claim which is disputed in part only, and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him." (*California. Sec. 1207 Code Civil Procedure.*)

The constitutionality of Section 1206 of the Code of Civil Procedure, which provides for giving preference to labor claims out of moneys received on execution, is affirmed by the Supreme Court, in the case of *Mohle vs. Tschirch*, 63 Cal. 381.

Similar provision for the securing of preferred labor claims exists in some of the other states, reference to them being here given.

Colorado. Acts 1885, p. 48, Sec. 25.

Montana. Sec. 2052 Compiled Statutes, 1887.

Nevada. Sec. 3831 General Statutes, 1885.

Oregon. II Hill's Codes, p. 1902.

§ 227. **Service of Notice.**—It has been held that the service of the notice required by Section 1206 of the California Code of Civil Procedure, *ante*, may be made upon the attorney for the attaching creditor. (*Carter vs. Green Mountain G. M. Co.*, 83 Cal. 222.)

§ 228. **How Insolvency Proceedings Affect Attachment.**—By the California Insolvent Act of 1880, upon the filing of the petition and of the order of adjudication of insolvency, "all proceedings against the insolvent shall be stayed" (Section 6); the sheriff is appointed receiver, to take charge of all the property of the debtor not exempt, until an assignee shall be appointed (Section 6); and upon the clerk's assignment of the insolvent property to the chosen assignee, all attachments made within one month next preceding the commencement of the insolvency proceedings shall be dissolved (Section 17).

The insolvency laws of Idaho, Nevada, and Washington also provide for a stay of all proceedings against the insolvent debtor, and for the taking possession, by the receiver or assignee, of all property not exempt from execution. The Oregon statute regulating assignments for the benefit of creditors provides that the making of the assignment dissolves all attachments in cases where judgment has not yet been taken. In Arizona and Colorado no provision is made for the relief of an insolvent debtor without the consent of his creditors, there being statutes, however, providing for assignments for the benefit of creditors. In each particular state, the effect of insolvency proceedings upon a subsisting attachment is to be determined by the statute in force.

Arizona. Secs. 22-39 Revised Statutes, 1887.

California. Secs. 6, 17 *Insolvent Act of 1880, as amended.*

Colorado. Acts 1885, pp. 43-48.

Idaho. Secs. 5880, 5884 *Revised Statutes, 1887.*

Nevada. Secs. 3853-4 *General Statutes, 1885.*

Oregon. Secs. 3173-87 *II Hill's Codes, 1892.*

Washington. Secs. 2762, 2764 *I Hill's Codes, 1891.*

§ 229. **Insolvency—Duties of the Sheriff.**—

Where the statute provides for a stay of all proceedings against the insolvent, no attachment can be levied after the filing of the petition and schedule in voluntary insolvency, and whatever property there may have been attached, passes from the hands of the officer to the person designated by the court as its custodian, or to the assignee. The officer should not abandon any property he may have attached belonging to the insolvent, for he would be liable for its loss thereby; but must keep it until the lawfully designated custodian appears to receive it. The lien of a levy under a writ of attachment is not dissolved by insolvency proceedings, except when provided by statute, as in California and Oregon; but proceedings under the writ are stayed. By statute in the former State, a creditor may, by consent of the insolvency court, prosecute his suit to a judgment for the purpose of ascertaining the amount due him, when the same is in dispute. (*California. Insolvency Act of 1880, Sec. 45.*)

§ 230. **Void Levy upon Insolvent's Property.**

—After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the court, and a creditor cannot, after the order staying proceedings, seize the property. The

order operates by its own force from its date, and no notice need be given of it to a sheriff with a writ against the insolvent. For example: An attachment issues against H., and the sheriff proceeds with the writ to his store, which is locked and fastened, front and rear, by iron shutters. The sheriff, with his deputy, stands at the door, guarding all entrance. H. now files his petition and schedule in insolvency, and the usual order of stay of proceedings is made. H. returns to the store and advises the sheriff of these things. The sheriff threatens to break open the store, when H. gives him the key, and he enters and levies. In such case it was held that the sheriff had no right to levy, and that the property vested in the assignee of the insolvent, subsequently appointed, by relation, from the filing of the petition and schedule. (*Tafts vs. Manlove*, 14 Cal. 47.)

§ 231. **Dissolved Attachment Not Revived.**—

An attachment levied within one month prior to the insolvency proceedings and dissolved by them (*Cal. Insolvency Act, Sec. 45*) is not revived by a subsequent dismissal of the insolvency proceedings. (*Wilhoit vs. Cunningham*, 87 Cal. 453.)

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§ 232. **Attachment of Personal Property—California.**—The manner of making levy of the writ upon personal property is prescribed in Subdivisions 3, 4 and 5 of Section 542 of the Code of Civil Procedure, and is as follows:—

"3. Personal property, capable of manual delivery, must be attached by taking it into custody.

"4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president or other head of the same, or the secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

"5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ." (See also *Sec. 264* as to garnishment.)

§ 233. **Arizona.**—Levy of the writ of attachment upon personal property is made by taking possession thereof, when the defendant is entitled to the possession: where the defendant has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them, when there are several. (*Secs. 55, 1906 Revised Statutes, 1887.*)

"A levy upon horses, mules, jacks, jennets, horned cattle or hogs running at large in a range, and which cannot be herded and penned without great inconvenience and expense, may be made by designating by reasonable estimate the number of animals and describ-

ing them by their marks and brands, or either; such levy shall be made in the presence of two or more credible persons, and notice thereof shall be given in writing to the owner, or his herder, or agent, if residing within the county and known to the officer." (*Sec. 1907.*)

"A levy on the stock of any corporation or joint stock company is made by leaving a notice thereof with any officer of such company." (*Sec. 1908.*)

"A levy upon the interest of a partner in partnership property is made by leaving notice with one or more of the partners, or with a clerk of the partnership." (*Sec. 1909.*)

In this State it is provided that, in making the levy, "the officer shall first call upon the defendant, if he can be found, or if absent, upon his agent within the county, if known, to point out property to be levied upon; and a levy shall first be made upon the property designated by the defendant or his agent; *provided*, that if it be personal property, the defendant or his agent deliver the same into the officer's possession. . . . If, in the opinion of the officer, the property so designated will not sell for enough to satisfy the execution and costs of sale, he shall notify the defendant or his agent thereof; whereupon the latter may make an additional designation." (*Sec. 1901.*) "If no property be thus designated, or if an insufficient amount of property be designated, it shall be the duty of the officer to levy upon the property of the debtor subject to execution, in the following order: (1) On personal or movable property; (2) on uncultivated lands; and (3) upon cultivated lands." (*Sec. 1902.*)

In case the defendant has not sufficient property in his possession to satisfy the debt, a writ of garnishment

may be issued upon the affidavit of the plaintiff, and this writ must be promptly served by the sheriff by delivering a copy thereof to the garnishee. After answer made by him and trial of the issue, if the garnishee is found to be indebted to the defendant, if any property of the defendant, subject to execution, is found to be in the possession of the garnishee, he shall pay over or deliver the same up to the sheriff to be held by him in the same manner as property attached. (*Sec. 72-100 Revised Statutes, 1887.*)

§ 234. **Colorado.**—Levy of the writ of attachment upon personal property capable of manual delivery is made by taking it into custody; upon stock of a corporation, by leaving a copy of the writ with the president, secretary, cashier or chief clerk, and if there be no such officer, then with some other officer, with a notice of the levy. (*Secs. 100, 104, Sub. 3, Code Civil Procedure.*)

Credits and personal property in the hands of third parties may be reached by writ of garnishment, to be issued upon request of the plaintiff after diligent search on the part of the officer has failed to disclose sufficient personal property to satisfy the plaintiff's claim. This writ is served and returned by the officer in the same manner as summons. The officer is required to administer an oath to the garnishee, who is to return written answers to certain statutory interrogatories propounded by the officer. If by admission of the garnishee or by trial of the garnishment, credits or personal property are disclosed, the same are to be delivered over to the officer, to be held as in case of attached property. (*Secs. 118-139 Code Civil Procedure.*)

§ 235. **Idaho, Montana, Utah and Nevada.**—

The manner of levying the writ is the same as prescribed in Section 542 of the Code of Civil Procedure of California, given in full in Section 232 of this work, *ante*.

Idaho. Secs. 4307-13 *Revised Statutes, 1887.*

Montana. Secs. 186-190 *Code Civil Procedure.*

Nevada. Secs. 3150-3 *General Statutes, 1885.*

Utah. Secs. 415-8 *Code Civil Procedure.*

§ 236. **Oregon.**—Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, is attached by taking it into his custody.

Other personal property is attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation, or interest or profits thereon, then with such person or officer of such association or corporation as the code authorizes a summons to be served upon. (*Sec. 149 I Hill's Codes, 1892.*)

Proceedings may be taken for examination of a garnishee and payment or delivery by him to the officer of any personal property or debts owing to or belonging to the defendant. (*Secs. 152, 164-171 I Hill's Codes, 1892.*)

§ 237. **Washington.**—Personal property capable of manual delivery is attached by taking it into custody.

Stocks or shares, or interest in stock or shares, of any corporation, association or company are attached by leaving with the president or other head of the

same, or the secretary, cashier or managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of the writ."

Debts and credits, and other personal property not capable of manual delivery, are attached "by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, a copy of the writ and a notice in writing that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, are attached in pursuance of such writ." (*Sec. 300 II Hill's Codes, 1892.*)

When neither the officer nor the plaintiff can find sufficient property to satisfy the claim sued on, the defendant may be examined under oath, and any "debts and credits attached may be collected by the sheriff, if the same can be done without suit," the officer's receipt being a sufficient discharge for the amount paid. (*Secs. 301, 303 II Hill's Codes.*)

A sheriff or constable may be garnisheed for money of the defendant in his hands, as also may a judgment debtor of the defendant, unless the judgment has been assigned on the record. Money in court may be attached, and an executor or administrator may also be garnisheed for money due from the decedent to the defendant. (*Secs. 306-7 II Hill's Codes.*)

§ 238. **Attachment of Vessels.**—In California the Code makes special provisions for attachment and sale of steamers, vessels and boats. (*Secs. 813 827 Code Civil Procedure.*) "The writ must be directed to the sheriff of the county within which the steamer, vessel or boat lies, and direct him to attach such

steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged in due course of law. The sheriff . . . must execute the writ without delay, and must attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture; . . . but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such vessel, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook or other persons employed on board." The attachment may be released upon the usual undertaking, if there are no claims for wages against the vessel. (*Secs. 818-823 C. C. P.*)

Special provision is also made in Montana for the attachment of boats and enforcement of claims against them. (*Montana. Secs. 206-222 C. C. P.*)

§ 239. **Statutory Procedure Exclusive.**—When a method of procedure is laid down by statute for the bringing of suits, levy of attachments and executions against vessels, it would appear that such procedure is exclusive of all provisions of the general law conflicting therewith; but that all provisions of the general law not conflicting are operative. This is in line with the settled rules of construction. (See *Secs. 4482-4 Code Civil Procedure, California.*)

§ 240. **Building as Personal Property.**—When a house is personal property, it is personal property capable of manual delivery, and must be attached as such.

§ 241. **Necessity of Prompt Action.**—As personal property, capable of manual delivery, must be

attached by taking it into custody, so no unnecessary time should be lost in executing the writ. It not infrequently happens that the defendant in the action has become suspicious that proceedings are about to be taken against his property, and that to avoid the anticipated seizure he is seeking to transfer his effects. In such cases, moments of time lost represent property fleeting as with wings, and the creditor is thus momentarily in danger of losing his debt. The object of the writ is to enable him to secure his claim, if it be a just one, and the law places the services of the officer at his command to accomplish that purpose. After carefully inspecting the writ to assure himself that it is in due form, and complying with the legal requirements relating to his fees for service, the officer must indorse upon the writ the time of its reception. He should proceed at once to the place indicated to him as the location of the property, and take it into custody, unless the defendant give him the statutory undertaking to prevent the attachment. (See also *Sec. 26, ante.*)

§ 242. **Liability for Delay.**—In proceeding to make a levy upon personal property, if the defendant express a wish to give the statutory undertaking to prevent or to release the attachment, the officer may exercise his judgment as to whether he can safely abstain from levying until the defendant shall have had sufficient time to get his sureties and execute the undertaking. In deferring a levy, however, the officer does so at his own risk. The property is within his reach, and he becomes responsible to the plaintiff for whatever loss may be sustained by reason of his neglect.

§ 243. **What Acts of Officer Are Justified under Writ.**—The writ commands the officer to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, unless the defendant gives the statutory undertaking for release. If the property to be attached is in a store, he may seize and take away sufficient of the stock of goods to meet the requirements of the writ. He may attach money in a drawer or safe or wherever found, but he cannot take property from the person of the defendant, except it be money or other valuables in a bag or package in the hand of the defendant. He may not break open the outer door or window of a dwelling house to make a levy, nor gain admission thereto by even lifting the latch of an outer door. But if, after gaining peaceable and lawful admission to the house, there is property of the defendant therein, he may take it even if he be compelled to break the inner doors of the house to reach it. If property to be attached is in a building other than a dwelling, he may use whatever force may be necessary to enable him to serve the writ, but he must first announce his office and business and make demand for admission. If resistance is made to the service, he may call to his aid whatever assistance is needful. But he should not go away from the place where the property is situated, to procure aid, if he can avoid doing so, for he will do so at the risk of losing the goods during his absence.

Personal property is not attached until it is within the view of the officer. The mere formality of standing at an outer door of a building in which goods are situated, and placing guards or keepers around the

building does not constitute a levy. (*Taffts vs. Manlove*, 14 Cal. 47; *Sec. 244, post.*)

The extent to which an officer may proceed in the use of force, in the breaking into a building to levy upon the goods of a debtor, has not been determined by any Supreme Court decisions of this State. Although a man's dwelling is by law deemed to be his castle and sacred from intrusion, it is not so with his warehouse, store or place of business. It has been definitely settled in many of the older states whose laws are similar to those of California, that an officer cannot break open the outer door of the defendant's dwelling, nor even lift the latch thereof to gain admission, to seize the defendant's property. After having gained peaceable entrance, however, he may break the inner doors, closets, drawers, boxes, chests or trunks, to seize property. In all cases where force may be used, the officer should first demand admission. The outer door of the defendant's store or other place of business may be broken open by an officer to enable him to make a levy, but all undue violence should be avoided when possible.

§ 244. **What Acts Necessary in Making Levy.**

—As the writ is only effectual from the time a valid and legal levy of the process has been completed, the question often arises, What constitutes a levy, valid and sufficient in law to vest the property? In *Taffts vs. Manlove*, 14 Cal. 47, the court say:—

“It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ, when it would not be good as to third persons. But we apprehend that this distinction is not based upon any difference in the legal requisites of a levy,

but in the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or agreement that *that* shall be a levy which, without such conduct, would not be sufficient. However this may be, we can conceive of no principle of law, and have been referred to no case, which holds that the acts relied on by appellant constitute a levy. Waiving everything else, the essential element of an intention to levy prior to the entry seems to be wholly wanting, from anything we can see in the agreed statement. That the sheriff came to the house in order to make the levy is very certain; but that he intended to make, or considered he *had* made, a levy on goods in the house, by standing at one door and putting his companion at the other, does not appear. He made then no note or memorandum of the levy—did not, perhaps, even know what goods were in the store, their description or value; and besides this, demanded the key afterward and entered, and *then* seized the goods, took the inventory, and indorsed the levy. There is neither proof nor probability that, before this time, he considered he had seized the goods, or if he did, we think he was clearly mistaken.

“In Crocker on Sheriffs, section 425, p. 172, it is said: ‘A levy upon personal property is the act of taking possession of, seizing or attaching it by the sheriff or other officer,’ etc. It is true, the author, in Section 427, says: ‘As against the defendant in execution, no great strictness of form will be necessary in making a levy upon personal property. Thus the mere entering by the sheriff of the property of the defendant, with his assent, upon the execution, will be conclusive upon such defendant, though the property is not present, and the officer does not *know* where it

is.' But this authority and the cases cited by appellant's counsel are far from proving the proposition they labor to sustain. It is not necessary to review these cases, for all of them turn upon a wholly different principle from that invoked. The principle, namely, that the assent of the defendant is sufficient as against him, even where the goods are not within view, or subject to the dominion of the officer.

"But it cannot be necessary to pursue this inquiry. It is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking house, as to stand in a store door at midnight, and claim that merely by standing there and preventing any person from coming into the store, he had levied on the contents, whatever they were, of the store, and this without having any knowledge of the nature of the stock, much less of the particular description or value. But, as we said before, nothing appears to show that the mere watching and guarding of the storehouse was meant to be a levy on the property inside; but these were acts merely in prosecution of the design to enter the house and levy on the property there, which purpose was afterward accomplished." (See also *Secs. 245-6.*)

§ 245. **What Constitutes Taking into Custody.**

- If a sheriff attaches personal property, consisting of a portable steam threshing engine and accompanying articles used for threshing, by making a memorandum of the property and delivering a copy of the attachment, summons and complaint to the defendant, and then directing verbally a person who is at work one hundred yards from the place where the property lies,

to look after it, and if anyone meddles with it to tell them it is attached, he has sufficient custody of the property as against persons purchasing it from the defendant with knowledge of the attachment. (*Rogers vs. Gilmore*, 51 Cal. 310.) In deciding this case, the court said:—

“The statute requires that the officer should take the property into custody. And it seems by the authorities that what that means is governed somewhat by the situation or relation of the parties making the contest. It is supposed that as against Gilmore himself there was sufficient custody of this property to hold it. Against another attaching creditor there may not have been. Against a purchaser from Gilmore, *in good faith*, there may not have been. But the court is of the opinion that the defendants purchasing from him *with notice* of the attachment, it is a sufficient custody as against them.” (See also *Secs. 244, 246.*)

§ 246. **Property Must Be within View of the Officer.**—The levy to be valid must be made by taking the goods into his custody and under his exclusive control. The articles must be within the power of the officer. He must continue to retain this power over them by remaining present himself, by appointing an agent or keeper in his absence, by taking a receipt for the property, by inventorying them, or by a seasonable removal of them. It is not necessary that they should be removed, but they must, in all cases, be put out of the control of the debtor. When the attachment is levied, the property must be within the view and subject to the control of the officer. (See also *Secs. 243 & ante.*)

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§ 247. **Void Levy—Instances.**—A levy made by a constable on goods which he does not see or have in his possession is void. (*Herron vs. Hughes*, 25 Cal. 556.) A levy brought about by unlawfully bringing property from one jurisdiction into another for that purpose is held to be utterly void.

§ 248. **Property Must Be Kept in Custody.**—When the statute requires the officer to levy upon personal property by taking it into custody, the officer cannot safely leave it in the possession of the defendant after making the levy. The principle is laid down in *Dutertre vs. Driard*, 7 Cal. 549, and *Sanford vs. Boring*, 12 Cal. 539, that if, after a levy of a writ of attachment upon personal property, by taking it into possession, the officer permit the defendant in attachment to resume its possession, the levy would be thereby defeated as against execution or attachment creditors subsequently levying thereon, or against a subsequent purchaser from the defendant in attachment, who, upon such purchase, takes the possession thereof.

§ 249. **Sheriff Responsible for Property Levied Upon.**—A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. In the case of *Sanford vs. Boring*, the defendant was sued as sheriff for a failure to make a levy and sale of property previously attached in the same suit—under an execution issued upon a judgment in favor of plaintiff and against Pultney & Armstrong. When the sheriff took

the property under the writ of attachment, he did not remove it, but left it all in the stable where it was attached, and in the possession of Armstrong, one of the then defendants, who continued in possession, and conducted the business as he had done before. The sheriff did not make the money, owing to a subsequent levy and sale of the property under execution against the same parties. In deciding the case adversely to the officer, the Supreme Court says:—

“The levy of the attachment placed the property in the hands of the sheriff to abide the judgment and execution, and this property was the plaintiff’s security for his debt. If the sheriff wasted or lost it, or suffered it to be diverted to some other purpose, he is liable. He had no right to suffer the property to go out of his possession, except in due course of law, and is responsible if he did.” (*Sanford vs. Boring*, 12 Cal. 539.)

§ 250. **Removal of Attached Property.**—When goods are attached in a store, dwelling, hotel or other establishment, and the defendant shows no inclination to procure a release of the attachment, or, on the contrary, desires the property removed, and that no keeper be left upon his premises, the wishes of the owner should be complied with as soon as practicable. How soon must depend upon the circumstances of the case. For while it is not only the right but the duty of the officer to seize the creditor’s property, yet the creditor’s house is his castle, and the officer by remaining therein, or by leaving his keeper therein, an unreasonable length of time, becomes a trespasser and may be ejected therefrom. He is not bound to remove the goods in the nighttime, when the levy has been made at too late an hour of that day to enable him to take them away with safety.

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§ 251. **Excessive Levy.**—If there is sufficient property in the defendant's possession to satisfy the claim of the attaching creditor, with costs, he will be liable to the latter if he does not levy upon sufficient goods to satisfy the judgment. If, on the other hand, he make an excessive levy, he is liable to the defendant in the action. Where there is great uncertainty at the time of the levy as to the value of the property attached, and it is subsequently ascertained that its value is greatly in excess of the demand sued for, it does not follow that the levy was therefore excessive. It is the duty of the officer to seize sufficient property to satisfy the amount specified in the writ—that is to say, property which would be sufficient, in his judgment, when sold at public auction. There are times when from the situation of the property, and other circumstances, there must be great uncertainty as to its value, and because it may turn out afterwards that the value of the property is much greater than the demand, it does not follow that the levy was therefore excessive. (*Sargey vs. Adkison*, 40 Cal. 408.)

§ 252. **Authority to Conduct Business under Attachment.**—An attorney has no authority, by virtue of his employment as such, to instruct a sheriff to conduct a business, such as a restaurant, upon which an attachment has been levied, and thereby bind his client for the expenses incurred. This is laid down as the law in California, in *Alexander vs. Denaveaux*, 53 Cal. 663, 59 Cal. 479, and is in accordance with Section 283 of the Code of Civil Procedure of California, which, in Subdivision 1, defines the authority of an attorney: "To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or

entered upon the minutes of the court, *and not otherwise.*" There are decisions to the contrary in other states, but they are probably based upon less stringent laws relating to clientage.

§ 253. **Allowing Defendant to Conduct Business.**—The fact that a stock of goods in a store is attached is not positive evidence that the defendant is insolvent and unable to pay the claim. Where the officer knows the debtor to be solvent, he may be morally, although not legally, justified in permitting the debtor's business to go on for a brief time, to enable him to settle with the attaching creditor, the officer in the meantime placing a keeper in charge of the goods, with the understanding that all moneys received by sales shall be turned over to the officer. When the officer makes this concession to the defendant, he of course does it upon his own responsibility, and is liable for any loss to the attaching creditor which may result therefrom. (See also *Sec. 252, ante.*)

§ 254. **Officer's Lien Dependent on Possession.**—An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had. (*California. Sec. 3057 Civil Code.*)

§ 255. **Attachment of Partnership Property.**—A sheriff, under an attachment, must take possession of the personal property upon which he levies. Being authorized to seize the interest of one of several part owners in a chattel, he must take the sole possession of

it, in order that it may be forthcoming at the day of sale. If a sheriff has a writ of attachment against one member of a partnership, he must attach the interest of that partner in the partnership effects, and in order to do so may take possession of the entire property. (*Clark vs. Cushing*, 52 Cal. 617.)

This subject is discussed at length in the chapter on "Executions against Personal Property" (Sections 399-435, *post*), where several authorities are cited, the rule being the same in case of attachment as on levy of execution, and also the same in case of a tenancy in common in chattels.

§ 256. **Sheriff's Keeper—Suggestions.**—In the attachment of personal property, the officer is responsible for its value from the moment the attachment is levied. If the plaintiff recover judgment, he will look to the officer for the value of the goods levied upon, or sufficient thereof to satisfy his judgment.

Hence it will be seen that the preservation of the property is of the utmost importance. If the property, or any portion of it, be not forthcoming at the proper time, the officer must make the loss good. When a keeper is required, the officer should select the person who is to take care of the property. Neither the plaintiff nor the defendant may dictate to the officer as to who shall take charge of the goods. The writ commands him to "attach and safely keep the property." He should make the expense of keeping it as light as possible, consistent with its safe keeping.

Where a mutual friend of the attaching creditor and debtor offers to act as keeper without pay, and the offer is accepted, a stipulation to that effect should be given to the officer, in writing, signed by the creditor and

debtor and the keeper. Experience, however, teaches that such a concession is often productive of annoyance and loss. The person thus acting as keeper is likely to consider himself less the trusted agent of the officer than the obliging friend of one or the other of the litigants. In such cases, circumstances are liable to arise wherein he cannot faithfully serve two masters—the litigant on the one hand, and the officer on the other. Such a course may sometimes be followed with safety, when there is but one attachment on the property. But if a second writ is placed in the hands of the officer, the officer becomes also liable to the second attaching creditor, and should assume such control over the goods as could not be questioned.

In one case a sheriff attached the contents of a livery stable, and by request of the attaching creditor and debtor, placed a mutual friend in charge as keeper, who, by verbal agreement, was to serve without pay. Some days afterwards the plaintiff notified the sheriff that the suit had been settled. The officer returned the writ in due time and dismissed the affair from his mind. In the meantime, the stable had changed hands, and in the course of some months later, the defendant brought an action against the officer for the return of the property attached or the value thereof. The officer found to his cost that he had been dealing with unscrupulous persons, and had a narrow escape from paying a heavy pecuniary penalty for his laxity in dealing with them in the earlier proceedings.

§ 257. **Expense of Keeping Property.**—In keeping property under process, the same prudence and economy should be exercised as in the ordinary business affairs of life. No unnecessary expense should be in-

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curred therein. Where the fee bill of the county provides that the costs of the officer shall be allowed by the court, a statement of the costs should be submitted to the court for approval before the return is made upon the writ.

A deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. (*Krum vs. King*, 12 Cal. 412.)

§ 258. **Consideration to be Shown Defendant.**

In making the seizure, the officer should exhibit as much regard for the position of the defendant as he can consistently with the duty he owes to the law, the creditor's rights and to himself. He should under no circumstance conduct himself tyrannically toward the debtor, nor proclaim the debtor's misfortune from the house top. Yet, to constitute a valid levy, the courts have held that some open, unequivocal act should be done that would lead all persons to know that the property was no longer in the custody of its former owner, but in that of the law. The levy of the attachment should be announced to whoever may be present in charge of the property, and if it is necessary for the safe keeping of the property, a keeper should be put in charge thereof.

§ 259. **What May Be Levied Upon.**—Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a deputy sheriff and constable, seized him, and by force took the bag of coin from him. The court held (*Green vs. Palmer*, 15

Cal. 412) that from its seizure thus situated, the plaintiff could not claim any exemption, as he might perhaps do in reference to money upon his person. Thus situated, it was like a horse held by its bridle, subject to seizure under execution against its owner.

As indicating an instance wherein money in the hands of a bailee may be attached, the case of *Chandler vs. Booth*, 11 Cal. 342, is cited, where A, who carried on a printing office, and was indebted to the hands of the office, placed in the hands of B a certain amount of money, with directions to B to pay the hands, which B neglected to do, and where there was no evidence showing that the hands agreed to look to B for their money, or that A was indebted to the hands in an amount equal or approximate to the sum in B's hands, and the money was subsequently attached in the hands of B at the suit of C against A, it was held that the money was liable to the attachment.

The sheriff cannot attach money collected on execution in his own hands. If at any time such money is subject to other process in his hands, such process must be executed by the coroner. Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment. (*Clymer vs. Willis*, 3 Cal. 363.)

The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can

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be enforced on its payment upon the attachment. (*Gregory vs. Higgins*, 10 Cal. 339.)

Property in the custody of the law, or in the hands of a receiver appointed by a competent court, is not liable to seizure without an order from the court having charge thereof. (*Yuba Co. vs. Adams & Co.*, 7 Cal. 35; *Adams vs. Haskell*, 6 Cal. 113.)

Funds in the hands of a receiver, in a suit for dissolution of a partnership, are subject to attachment at any time before a final decree of dissolution and distribution. (*Adams vs. Woods*, 9 Cal. 24.) See also *Sec. 216, ante*.

§ 260. **Certain Building Materials Not Attachable.**—"Whenever materials shall have been furnished for use in the construction, alteration or repair of any building or other improvement, such materials shall not be subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement." (*California. Sec. 1196 C. C. P.*) Compare: *Nevada. Sec. 3820 General Statutes, 1885.*
Oregon. Sec. 3680 II Hill's Codes, 1892.
Washington. Sec. 1675 I Hill's Codes, 1891.

§ 261. **Property in Foreign Receiver's Hands.**

Personal property in the lawful custody of a foreign receiver, brought into a state in the course of business, is subject to attachment under its laws by a creditor resident of the state, and the attaching creditor has the superior right. (*Humphreys vs. Hopkins*, 81 Cal. 551.)

§ 262. **Inventory of Property--Request to Garnishee.**—"The sheriff must make a full inventory of the property attached and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each, and if such memorandum be refused, he must return the fact of refusal with the writ." (*California. Sec. 546 C. C. P.*) Compare:

Idaho. Sec. 4311 Revised Statutes, 1887.

Montana. Sec. 191 Code Civil Procedure.

Nevada. Sec. 3154 General Statutes, 1885.

Oregon. Secs. 148, 152 I Hill's Codes, 1892.

Utah. Sec. 419 Code Civil Procedure.

Washington. Sec. 308 II Hill's Codes, 1891.

§ 263. **Garnishment--Nature of.**—The attachment of debts, credits and other personal property not capable of manual delivery by service of notice and copy of the writ, is what is generally termed garnishment. Upon serving the same, the officer must request the person to whom it is delivered to make a statement in response to the garnishment. It is a custom with officers to deliver with the notice of garnishment a printed blank for an answer, or statement. The service of garnishment should be promptly performed, the nature of the kind of personal property thus attachable being easily and quickly transferable. When served upon a corporation, the notice should be directed to the corporation by its full name.

§ 264. **Garnishment Generally, in California.**—The provisions of law applicable in California to the

attachment of debts and personal property in the hands of a third party, called the garnishee, are contained in Sec. 542, Sub. 5, Code of Civil Procedure (*Sec. 232, ante*) and in Secs. 543-6, as follows:—

"SEC. 543. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ. [Sec. 544 will be found in Sec. 267 of this work, *post*.]

"SEC. 545. Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

"SEC. 546. . . . To enable him to make . . . return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal

with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit."

§ 265. **Penalty for Failure to Disclose.**—In serving a garnishment, where the person served refuses to give to the officer the required statement or memorandum of the debt or of his having the credit, it is proper to inform him of the provisions of law (see *Sec. 264, ante*), providing that he may be required to pay the costs of any proceeding taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

In other states provisions exist similar to those in California, fixing a penalty for failure of the garnishee to give the memorandum requested by the officer.

Arizona. Sec. 84 Revised Statutes, 1887.

Colorado. Sec. 138 Code Civil Procedure.

Idaho. Sec. 4311 Revised Statutes, 1887.

Montana. Sec. 191 Code Civil Procedure.

Nevada. Sec. 3154 General Statutes, 1885.

Oregon. Sec. 152 I Hill's Codes, 1892.

Utah. Sec. 419 Code Civil Procedure.

Washington. Secs. 308-9 II Hill's Codes, 1891.

§ 266. **Examination of Defendant Limited.**—Under the California provision for examination of the person garnisheed (*Sec. 545 Code Civil Procedure; Sec. 264, ante*), which provides that "the defendant may also be required to attend for the purpose of giving information as to his property," it is held that the defendant cannot be compelled to submit to an examination as to the

condition and situation of his property, nor can he be compelled to deliver up his property. (*Ex parte Rickleton*, 51 Cal. 316.) The court held that the only supposed authority for such a step, Section 545 of the Code of Civil Procedure, is confined to proceedings against persons owing debts to the defendant, or having possession of credits or other personal property belonging to the defendant. It is in that section provided in terms that such persons may be required to submit to examination touching such debts or such property, and the order to be made, or which may be made, as the result of such an examination, manifestly refers to the disposition of property not in the hands or under the personal control of the defendant, but in the possession or under the control of the garnishee. "The provision in that section," says the court, "to the effect that the defendant may also be required to attend for the purpose of giving information respecting his property, does not look to the entry of an order directing him to surrender property in his own possession, but merely to give such information, under oath or otherwise, as will facilitate the examination of a garnishee under examination."

When the garnishee denies that he is indebted to the judgment debtor, neither the referee nor the court has power to compel him to pay to the sheriff the amount of his alleged indebtedness, but the court may enter an order authorizing the judgment creditor to institute an action against the garnishee to determine the question of indebtedness. (*Hartman vs. Olvera*, 51 Cal. 501.)

§ 267. **Liability of Garnishee.**—"All persons having in their possession, or under their control, any

credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." (*California. Sec. 544 Code Civil Procedure.*)

A garnishee can only be required to answer as to his liability, to the debtor defendant, at the time of the service of the garnishment. (*Norris vs. Burgoyne, 4 Cal. 439.*)

§ 267a. **Property in Custody of the Law.**—Money in the hands of the sheriff, collected on execution, is not the subject of garnishment, unless by express authority of law. (See *Sec. 217a, ante.*)

§ 268. **Collection from Garnishee.**—Debts and credits due to a defendant, when attached, may be collected by the sheriff, if the same can be done without suit; and the sheriff's receipt is a sufficient discharge for the amount paid. (*California. Sec. 547 Code Civil Procedure.*) When collected, they must be held to answer the judgment.

§ 269. **Garnishment in Other States.**—Provisions more or less similar to those contained in the preceding section prevail in other states for the attachment and disclosure of debts, credits and other personal property in the hands of third parties. (See references below and also *Secs. 232-7, ante.*) In some

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states, as in Arizona and Colorado, statutory provision is made for the issuance of a separate writ of garnishment requiring the garnishee to appear within a certain time or suffer judgment by default. (See *Secs. 233-4, ante.*)

Arizona. Secs. 72-84 Revised Statutes, 1887.

Idaho. Secs. 4309-11 Revised Statutes, 1887.

Colorado. Secs. 118-139 Code Civil Procedure.

Montana. Secs. 188-190 Code Civil Procedure.

Nevada. Secs. 3150, Sub. 4, 3151-4 General Statutes, 1885.

Oregon. Secs. 163-171 I Hill's Codes, 1892.

Washington. Secs. 300, Sub. 4, 305-311 II Hill's Codes, 1891.

§ 270. **Distinction between Debts and Credits.**—In the statute prescribing how “debts and credits” may be attached, a distinction is made between them, and a return showing levy upon one constitutes no lien upon the other. A debt is money owing by the garnishee to the defendant, which may be paid over to the sheriff; while credits are something belonging to the defendant but in the possession of the garnishee, such as promissory notes which may be delivered up or transferred to the sheriff. (*Gow vs. Marshall*, 90 Cal. 565.)

§ 271. **Garnishment of Corporations.**—To render the process of attachment effectual against a corporation as garnishee, the writ and notice must be served on the president, or other head of the same, or the secretary, cashier or other managing agent thereof. In the case of a banking corporation, service of process on the teller, whose only duty is to receive and pay out all

moneys which come into and go out of the bank, is not sufficient to bind the corporation. (*Kennedy vs. Hibernia Savings and Loan Society*, 38 Cal. 151.)

A savings bank cannot avoid its liability to pay over the money of its depositor, on a garnishment at the suit of depositor's creditor, on the ground that its by-laws, assented to by the depositor, make his pass book, in which his account is kept, transferable to order (*Witte vs. Vincent*, 43 Cal. 325); for such pass book is not a negotiable instrument in a commercial sense, nor can the agreement of the parties make it so.

In Oregon the garnishment is required to be served upon such person or officer of the corporation as a summons is authorized to be served upon. (*Sec. 149 I Hill's Codes*, 1892.)

§ 272. **Garnishment—Offset Allowable.**—Where a railroad company is served with garnishment for the purpose of attaching wages of an employe, and the company is liable for the board and other debts contracted by the employe in an amount equal to the wages due, the garnishment is ineffectual. (*In re Union Pacific Railway Company vs. Gibson*, Supreme Court of Colorado, Nov. 19, 1890.)

§ 273. **Garnishment of Estate Funds.**—Money in the hands of an administrator may be garnisheed as the property of the distributee after decree of distribution has been made, but not before. (*Estate of Nerae*, 35 Cal. 392.)

§ 274. **Stocks Attachable by Garnishment.**—Stocks or shares which the defendant may have in any corporation or company, together with the interest and

profit thereon, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution. In California "stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ." (*Sec. 542 Code Civil Procedure.*) Similar provisions exist also in other states.

Arizona. Sec. 1908 Revised Statutes, 1887.

Colorado. Sec. 100 Code Civil Procedure.

Idaho. Sec. 4307 Revised Statutes, 1887.

Montana. Sec. 186 Code Civil Procedure.

Nevada. Sec. 3150 General Statutes, 1885.

Oregon. Sec. 149 I Hill's Codes, 1892.

Utah. Sec. 415 Code Civil Procedure.

Washington. Sec. 300 II Hill's Codes, 1891.

§ 275. **Mortgage Attachable by Garnishment.**
—Debts secured by mortgage, like other debts, may be attached by garnishment, but in no other way, and their payment may be enforced under the provisions of the code relating to proceedings supplementary to execution. (*McGurren vs. Garrity, 68 Cal. 566.*)

§ 276. **Stocks Not Transferred on Books.**—No transfer of stock issued by a corporation is good against third parties, under the California Code provisions, unless the transfer be made upon the books of the corporation (Section 324 Civil Code). Therefore, although such shares be sold and delivered, they may still be subjected to attachment and sale in an action against the vendor, if no transfer has been made on the corporation books.

Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, and attachment on his interest in the corporation. In such a case the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee. (*Edwards vs. Beugnot*, 7 Cal. 159.)

§ 277. **When Garnishment Is Not a Lien.**—Service of a copy of the writ and notice of garnishment upon a third party constitutes no lien on property of the defendant in the hands of a third party, capable of manual delivery. The California Code (*Section 542 Code Civil Procedure; Section 232 ante*) provides one distinct method of levying upon personal property capable of manual delivery, and another equally distinct method of levying upon personal property not capable of manual delivery. That there are different ways pointed out to the officer by the law, in one or the other of which he must act, according to the nature of the property he is about to seize, should not be lost sight of. The writ affects property only from the time of a lawful levy in accordance with the statute. (*Johnson vs. Gorham*, 6 Cal. 195.)

§ 278. **Attachable Interest of Lessee in Leased Property.**—A contract by which A lets B have a flock of sheep which he owns, and of which he is to retain the ownership, to keep for three years, and by which B is to deliver to A the wool sheared from the sheep, and A is to sell it and pay B one-half the proceeds, and by which B is to deliver to A, at the end of the term, the sheep, and A is then to divide with B the increase, giv-

ing B one-half the increase as compensation for his services, does not give B such an interest in the sheep or increase as will support a seizure of them under an attachment against the property of B. The interest of B in the sheep must be reached by his creditors under a different proceeding. (*Tuohy vs. Wingfield*, 51 Cal. 319.) The proper procedure would have been by garnishment on the owner of the sheep.

§ 279. **Claim by Third Party.**—The numerous suits to be found in the court records against sheriffs and constables would seem to indicate that the greatest risks incurred by these officers in civil cases lie in the taking of property under writs of attachment and execution. Where the property belongs to the defendant, and there is no controversy concerning its ownership, the path of duty is smooth and clear. The officer has only to follow the course pointed out by the law to a satisfactory conclusion. But when the property levied upon is claimed by a stranger to the writ, the officer's responsibility begins. When the creditor appeals to the courts for aid in the collection of his account, the debtor, as a general rule, either succumbs to the inevitable force of circumstances or assumes an attitude of hostility. If he submits to a seizure and sale of his effects, in acknowledgment of the justness of the creditor's claim, the officer's course is simple and easily performed. If, on the other hand, the debtor choose to throw obstacles in the creditor's way, the officer finds himself beset with difficulties and dangers. Transfers of personal property are easily effected, and, under the pressure of legal proceedings, the whilom successful merchant, contractor or what not, has suddenly become insolvent. If the transfer has been legally made, the

creditor has no redress. If the requirements of the law have not been complied with, concerning the delivery and possession of the property, the creditor may cause it to be seized under legal process and made to answer for the debt. Although the debtor may have actually sold his property, received the purchase money for it, and given written evidence to the purchaser of the sale, yet in some states the sale will not stand before the law if there has not been an actual delivery of the property and a continued possession thereof in the purchaser. (See chapter on "Fraudulent Transfers," *Sec. 591, post.*) Relying upon his legal rights, which so closely adapt themselves to his moral rights in the matter, the creditor pursues the property and claims his remedy in it. The sooner, then, that the officer who has levied upon the property secures an indemnity bond with sureties upon whom he can rely for the payment of any judgment that may be rendered against him in favor of the claimant, the easier will be the burden of his duties thereon.

§ 280. **Right of Officer to Indemnity.**—When an attachment or execution is placed in the hands of an officer to be executed, he may demand indemnity of the plaintiff in the execution before he can be required to seize property in possession of third parties claiming to be the owners, and if the plaintiff, upon demand, fails to indemnify the officer, and he thereupon returns the writ *nulla bona*, an action for false return cannot be maintained, even if it should turn out that the goods so found in the hands of strangers claiming to own them, were the goods of the defendant in the writ. This declaration appears in the opinion of the court in the case of *Long vs. Neville*, 36 Cal. 459, but it is

qualified by the further statement that "where statutes exist providing for calling a sheriff's jury preliminary to demanding indemnity, it may be necessary to call a jury before demanding the indemnity, unless the calling of a jury be waived." An officer called upon to serve a precept, either by attaching property or arresting the person, if there be any reasonable grounds to doubt his authority to act in the particular case, has a right to ask for an indemnity.

He is not obliged to serve process in civil actions at his own peril, when the plaintiff in the suit is present, and may take the responsibility upon himself.

The risk he is required to run is not for himself, but for the benefit of the attaching creditor. If the goods, moreover, as the creditor alleges, are the property of his debtor beyond dispute, he, the creditor, cannot be injured by giving the indemnity, and if they are not, it is right that he who, for his own supposed advantage, insists on the seizure, should take the consequences of the act.

In Washington statutory provision is made for the giving of an indemnifying bond to the sheriff, if he require one, before serving any civil process. (*Washington. Sec. 328 I Hill's Codes, 1891.*)

§ 281. **Claim by Third Party—Statutory Provisions.**—The procedure in cases where personal property attached is claimed by a third party varies in the different states and territories. In California if the property be claimed by a written claim verified by the oath of the claimant, setting out his title and right to possession and stating the grounds of the title, the sheriff is not bound to keep the property unless the person in whose favor the writ runs, on demand, indem-

nify the sheriff against such claim by "an undertaking by at least two good and sufficient sureties." In Colorado a court trial is had as to the right of property. In Idaho the sheriff is to call a jury of six persons, and their verdict in favor of the claimant justifies the officer in releasing the property. In Montana and Nevada, if the property be claimed under oath, the sheriff must deliver it to the claimant, unless the plaintiff gives a good and sufficient indemnity bond. In Oregon a jury of six persons is to be called by the sheriff, and if their verdict be in favor of the claimant, the officer may still proceed under the writ if the plaintiff give him a sufficient indemnity bond. In Arizona and Washington, upon the filing of the affidavit and a sufficient bond by the claimant, the property must be delivered to him, and a court trial is then had as to the right of property.

Arizona. Secs. 57, 3166-90 *Revised Statutes*, 1887.

California. Secs. 549, 689 *Code Civil Procedure*.

Colorado. Secs. 2711, 2730 *Mill's Ann. Stats.*, 1891.

Idaho. Sec. 4314 *Revised Statutes*, 1887.

Montana. Sec. 193 *Code Civil Procedure*.

Nevada. Sec. 134 *Code Civil Procedure*.

Oregon. Sec. 286 *I Hill's Codes*, 1892.

Washington. Secs. 491-5 *II Hill's Codes*, 1891.

§ 282. **Sheriff's Jury—Indemnity.**—In some states it is provided that if any personal property attached be claimed by a third person as his property, the sheriff may summon a jury to try the validity of such claim. Except in case of statutory provision to the contrary, the trial or right of property by such jury determines and fixes the right of no one, except the right of the officer to demand indemnity, and doubtless was intended for that purpose only.

§ 283. **Time to Procure Bond.**—The plaintiff is entitled to a reasonable time to furnish the bond, such time being dependent mainly upon the distance he has to go to procure the sureties, and in this the officer should indulge him so far as he can do so with safety to himself. If the plaintiff or his attorney agree to give the bond, the plaintiff is responsible in law to the officer from that time; and if the plaintiff is financially responsible, the officer may safely proceed to levy, if he has not already done so. It would not, however, be advisable to notice the property for sale until the receipt of the bond.

§ 284. **Time a Bond Takes Effect.**—A bond to indemnify a sheriff takes effect from the time of its delivery. (*Buffendeau vs. Brooks*, 28 Cal. 642.) But it creates no cause of action until the sheriff has been compelled to pay and has paid damages. (*Oaks vs. Scheifferly*, 74 Cal. 478.)

§ 285. **Waiver of Sheriff's Jury.**—In those states where provision exists for the summoning of a sheriff's jury, before calling a jury to try the rights of property the officer should notify the plaintiff or his attorney of the claim and of his intention to summon a jury, so that he may, if he wish, waive the calling of the jury and elect to give to the officer an indemnity bond against the claim. If the plaintiff waive a trial by jury, and give the bond with sureties satisfactory to the officer, it is the duty of the latter to go on and make the judgment. The officer then becomes the agent of the plaintiff, and must depend upon him and the sureties for protection against any suit the claimant may bring against him, by reason of the seizure and sale of the property.

§ 286. **Sheriff's Jury No Protection.**—In the absence of statutory provision otherwise, if the verdict of the jury be against the claimant, he may yet bring his action for trespass or replevin.

If it should be against the plaintiff in attachment or execution, and he indemnify the officer, then the officer is bound to hold the goods, and the claimant must bring his action or lose his rights. If the plaintiff give the bond of indemnity, it will only inure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned.

The verdict of a sheriff's jury is no protection to the officer in a suit brought against him; and it is held (in *Perkins vs. Thornburg*, 10 Cal. 191, and *Sheldon vs. Loomis*, 28 Cal. 123) that such a verdict is not admissible in evidence as a defense. When an officer has reason to believe that the property seized under attachment or execution belongs to a stranger to the writ, he should for his own protection and in the interests of all others concerned, inquire into the ownership thereof.

§ 287. **Double Indemnity.**—Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterwards the party claiming the property obtained judgment against the sheriff for the value of the property: *Held*, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. In such case, the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. The sheriff was the separate

agent of both attaching creditors, but in the order stated, and as he disposed of the property to the benefit of the first alone, he must look to him, and not the second attaching creditor. (*Davidson vs. Dallas*, 8 Cal. 227.)

§ 288. **Replevin from Sheriff.**—If attached personal property in the hands of the sheriff is claimed by a third party, and taken by writ of replevin, executed by the coroner, the sheriff should require the sureties on the replevin bond to justify, otherwise he may be held liable for negligence. (*Noble vs. Desmond*, 72 Cal. 330.)

§ 289. **Estoppel of Owner of Attached Property.**—Where A, the owner of property, represents that certain property in his possession belongs to B, and that representation coming to the ears of C, a creditor of B, who sues out an attachment against B, and seizes the property: *Held*, that A is estopped from setting up a claim to the property. (*Mitchell vs. Reed*, 9 Cal. 204.) In so deciding, the court said: "If parties choose to make untrue statements, by which others are injured, they should be estopped to unsay what they have before said. Estoppels, in general, are odious; but in mercantile and ordinary business transactions, where men must trust to appearances and the declarations of parties, because they have no other means of information in such cases, the courts have been inclined to extend the list of estoppels."

One who, with knowledge of all the facts and circumstances surrounding the transaction, gives to the sheriff an accountable receipt for property levied upon as the property of another, is estopped from afterwards asserting ownership in himself, unless at or before the giving

of the receipt he made known his claim to the officer. (*Blevin vs. Freer*, 10 Cal. 172; *Dresbach vs. Minnis*, 45 Cal. 223.)

§ 290. **Release of Attachment.**—After the attachment has been levied, the sheriff should release it only by order of court or upon order of the plaintiff's attorney or upon the giving of the statutory undertaking by the defendant. When real property is affected, the officer should record a certified copy of the order for release, and a notice that the property is released.

§ 291. **Release by Judgment for Defendant.**—"If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent." (*California. Sec. 553 Code Civil Procedure.*)

In case of a dismissal of an action by a justice of the peace for non-appearance of the plaintiff, the judgment for defendant operates as a dissolution of an attachment, although the justice reinstates the case, and the parties appear and try it. (*O'Connor vs. Blake*, 29 Cal. 313.)

§ 292. **Release on Undertaking Given.**—Statutory provision is made for the release of the attachment upon the giving of a bond to be taken by the sheriff. When a sufficient undertaking is taken by him, his duty in the premises is discharged, and he has no further responsibility in the matter. (*Curiac vs. Packard*, 29 Cal. 194; also *Preston vs. Hood*, 64 Cal. 405.)

In going to make a levy upon personal property, the

officer will sometimes find it convenient to have with him a blank undertaking to prevent attachment, and, also, a blank undertaking for the release of an attachment. It is not obligatory upon him to have such blanks with him, but much time and annoyance may sometimes be saved by having them at hand, where the defendant wishes to retain the custody of his property.

Arizona. Sec. 58 *Revised Statutes*, 1887.

California. Sec. 540 *Code Civil Procedure*.

Colorado. Secs. 111-2 *Code Civil Procedure*.

Idaho. Sec. 4319 *Revised Statutes*, 1887.

Montana. Secs. 198-9 *Code Civil Procedure*.

Nevada. Sec. 3148 *General Statutes*, 1885.

Oregon. Sec. 154 I *Hill's Codes*, 1892.

Utah. Sec. 427 *Code Civil Procedure*.

Washington. Sec. 316 II *Hill's Codes*, 1891.

§ 293. **Form of Undertaking.**—A common law bond, in form, upon the prescribed statutory conditions, given to a sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute. (*Curia vs. Packard*, 29 Cal. 194.) In this case the court decide that the undertaking, if sufficient, is to be taken by the sheriff when the property *has been* as well as when it *is about to be* attached.

§ 294. **Sureties on Bond for Release.**—If the defendant desires to give the statutory undertaking for release of the attachment, the officer should satisfy himself that the sureties are able to respond to the obligation they assume. He should question the persons who present themselves to him as sureties, concerning their proper qualifications, and seek to secure the plaintiff as he would himself.

§ 295. **Money Deposited to Release Property.**

—Where the defendant in an action, whose property had been attached by the sheriff, deposited with the sheriff a sum of money in gold coin, in lieu of an undertaking, to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney: *Held*, that after plaintiff recovered judgment, the persons who borrowed the money did not hold it in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution. (*Hathaway vs. Brady*, 26 Cal. 581.) Under such conditions the money ceases to be in the custody of the law.

§ 296. **Release upon Plaintiff's Order.**—The direction to release the attachment should be in writing, signed by the plaintiff or his attorney. There may be circumstances attending a case where such direction should come from the plaintiff's attorney, and not from the plaintiff. The plaintiff may, through ignorance, divest himself of his rights by causing a release to be precipitately made; and, hence, as a rule, it is generally most prudent to look to the attorney for such instructions. In the case of *Perlberg vs. Gorham*, 10 Cal. 121, where a partnership existed between two persons in the purchase of goods, and they subsequently brought suit to recover their value from a trespasser who had seized them, it was held that one partner is competent to execute a release in the name of himself and co-partner. But it is not always safe to recognize such a

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right. In the case of *Perlberg vs. Gorham*, 23 Cal. 349, the defendant Gorham, as sheriff, levied on goods claimed by the plaintiffs. After suit had been brought, one of the attaching creditors procured a release from one of the plaintiffs, executed in the name of both, of all actions, etc.; it was held that if this release was obtained by fraud, it was void, and the sheriff could derive no advantage from it, although he was not implicated in and knew nothing of the fraud.

§ 297. **Proceedings on Release.**—When an attachment on personal property is released, the property should be returned to the person from whom it was taken. Where the property has been taken from the defendant, it should be returned to him or to his agent, or to such person as the defendant may, in writing, direct the officer to deliver it to. The officer should take a receipt therefor from the person to whom it is delivered. An officer cannot with safety ignore these seemingly unimportant business formalities.

§ 298. **Death of Defendant Destroys Attachment Lien.**—If the defendant die after the levy of an attachment upon his property and before judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator, to be administered on in due course of administration. (*Myers vs. Mott*, 29 Cal. 351.)

§ 299. **Release by Appeal.**—After judgment in favor of defendant, the attachment is at once and *ipso facto* discharged, under the express provisions of Section 553 of the California Code of Civil Procedure, although an appeal be taken by the plaintiff, on which

appeal he ultimately obtains judgment. An attachment being merely a creature of statute, can continue no longer than the statute provides. (*Loveland vs. Alzord C. Q. Mg. Co.*, 76 Cal. 562.)

§ 300. **Liability for Failure to Release.**—After an order of court for the release of an attachment, the sureties on the attachment bond become liable and the possession by the sheriff, if retained, becomes unlawful. (*Gardner vs. Donnelly*, 86 Cal. 367.)

§ 301. **Expense of Keeping Property Levied Upon.**—The sheriff is allowed his necessary expenses in keeping and preserving property seized on attachment or execution, the amount to be fixed by the court and paid out of the fees collected in the action. (*California Statutes*, 1893, p. 507.)

§ 302. **Sheriff's Fees to be Paid.**—The officer cannot be compelled to release property from attachment until his fees are paid. (*Robinett vs. Connolly*, 76 Cal. 56; *Perrin vs. McMann*, 97 Cal. 52.) But where levy has been released by a stay bond, he must demand payment and offer to return the property upon payment of the amount lawfully due to him. (*Sam Yuen vs. McMann*, 99 Cal. 497.)

§ 303. **Change of Sheriffs—Fees on Release.**—When a sheriff goes out of office, holding attached property in his possession, the party wishing to release must seek him and pay his fees in full up to the time of the release. (*Perrin vs. McMann*, 97 Cal. 52.)

§ 304. **Attachment of Mortgaged Personal Property.**—When an officer is directed to attach per-

sonal property of such character as may by law be the subject of a valid mortgage as against third parties, he should, before proceeding to levy, or as soon thereafter as possible, ascertain if the property has been mortgaged; otherwise he may render himself liable for seizing mortgaged property without first satisfying the mortgage claim, as he is bound to take notice of all valid mortgages of record made under the statute authorizing mortgages of personal property.

§ 305. **Mortgage of Personal Property.**—In California the following personal property may be mortgaged, so as to be valid security as against third parties without change of possession:—

"1. Locomotives, engines and other rolling stock of a railroad.

"2. Steamboat machinery, the machinery used by machinists, foundrymen and mechanics.

"3. Steam engines and boilers.

"4. Mining machinery.

"5. Printing presses and material.

"6. Professional libraries.

"7. Instruments of a surveyor, physician or dentist.

"8. Upholstery and furniture used in hotels, lodging or boarding houses.

"9. Oil paintings, pictures and works of art.

"10. Growing crops.

"11. Vessels of more than five tons' burden.

"12. Instruments, negatives, furniture and fixtures of a photograph gallery.

"13. The machinery, casks, pipes, tubes and utensils used in the manufacture of wine, fruit brandy, fruit syrup or sugar.

"14. Pianos and organs.

"15. Iron and steel safes.

"16. Neat cattle, horses, mules, swine and sheep, and the increase thereof." (*California. Sec. 2955 Code Civil Procedure.*)

§ 306. **Object and Effect of Record.**—The object to be attained by requiring the recording of mortgages of personal property is the same as that providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. The recording of the mortgage is therefore made by the code the equivalent of an immediate delivery and continued change of possession, and creditors and subsequent purchasers or incumbrancers are bound by the notice which it imparts. By and under it, the mortgagee is, in law, in possession of the chattels, and an officer having an attachment or execution against the mortgagor, is not authorized to levy upon them without first paying the mortgage debt.

§ 307. **Requisites for Validity.**—"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property, in good faith and for value, unless:—

"1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors.

"2. It is acknowledged or proved, certified and recorded in like manner as grants of real property." (*California. Sec. 2957 Civil Code.*)

§ 308. **Payment of Mortgage before Levy.**—
“Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor. . . . but, before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee.” (*California. Sec. 2968-9 Civil Code.*)

A transfer of property by chattel mortgage, properly executed and recorded, passes the title without delivery. (*California. Sec. 2957 Civil Code.*) The mortgagee is, in law, in possession of the mortgaged chattels, and an officer having an attachment or execution against the mortgagor is not authorized to levy upon them without first paying the mortgage debt. (*Berson vs. Nunan, 63 Cal. 550.*)

A transfer of property by chattel mortgage, executed with the formalities of law and recorded, passes the title, although conditional and defeasible, whether the property be or be not delivered. The rights of the parties to the mortgage are fixed by the code. They are purely statutory rights, and as the code declares that such a mortgage is not void as to creditors or subsequent purchasers, for want of an actual and continued change of possession, the title of the mortgagee is not affected for want of it. (*Heyland vs. Badger, 35 Cal. 404.*)

Where, on the trial of an action for the replevin of goods from a defendant who, in answer, admitted the taking, but justified under legal process against a third party, held and served by him as sheriff, it was proved by plaintiff that he held an unsatisfied chattel mortgage of the goods, duly executed by said third party, for

their purchase price, of which defendant had notice: *Held*, that upon this state of facts, and in absence of any evidence tending to justify the taking of the goods by defendant, plaintiff was entitled to judgment for their recovery. (*Stringer vs. Davis*, 35 Cal. 25.)

§ 309. **Liability for Wrongful Levy.**—Under a statute requiring prior payment of the mortgage debt before mortgaged personal property can be attached, the officer is liable to the mortgagee as for a conversion if he levies an attachment and appoints a keeper without complying with the statute, although he does not move or otherwise disturb the property. (*Irwin vs. McDowell*, 91 Cal. 119.)

If the officer seize such property without payment of the mortgage debt, the party injured may, by action, recover the amount which will compensate him for all the detriment proximately caused by the breach. The law casts upon an officer the duty or obligation of paying to a mortgagee the amount of the debt due the mortgagee before he, the officer, may take the property, and therefore if he seizes such property without paying, tendering or depositing the amount due, the detriment proximately caused by such seizure is not the value of the property seized, but the amount of the mortgage debt. (*Wood vs. Franks*, 56 Cal. 217.)

§ 310. **Creditor to Advance Payments.**—The officer is not bound to make the seizure unless the attaching creditor furnish him with the requisite funds to make the payment. A failure to furnish the funds would be a good defense by the officer in a suit against him by the attaching creditor. If, however, the officer, waiving his right to be protected, seizes the property

without payment, tender or deposit, he assumes to make good to the mortgagee the detriment caused by the seizure, and the mortgagee is not left to his action of trover or replevin. (*Wood vs. Franks*, 56 Cal. 217.)

§ 311. **Attachment of Growing Crops.**—An unripe growing crop is personal property not capable of manual delivery, and an attachment must be levied upon it as such. In the case of *Raventas vs. Green*, 57 Cal. 254, it is decided that an attachment upon such property in the possession of the defendant is sufficiently levied by serving upon him copies of the writ and statutory notice; and if the sheriff does nothing further until the crop is ripe, when he gathers it, there is no abandonment of the attachment. In that case the court say:—

“There is no doubt that an unripe growing crop of grain is property. It is property subject to attachment (*Code of Civil Procedure*, Sec. 541), and is personal property (*Civil Code*, Sec. 2955; *Davis vs. McFarlane*, 37 Cal. 638). And it is personal property not capable of manual delivery (*Davis vs. McFarlane*, and authorities there cited). Being personal property not capable of manual delivery, and being subject to attachment, how is it to be attached? In the third subdivision of Sec. 542 of the Code of Civil Procedure, it is provided that ‘personal property capable of manual delivery must be attached by taking it into custody;’ and in the fifth subdivision, that ‘debts and credits, and *other personal property not capable of manual delivery*, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing

by him to the defendant, or the credits and other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of such writ.' . . . The purpose of the statute was, as its language indicates, to declare the manner in which property subject to attachment should be attached; and with respect to personal property, provides that such property, when capable of manual delivery, must be attached by the officer taking it into his custody, but that where not capable of manual delivery, must be attached by leaving with the person having it in his possession or under his control, or with his agent, a copy of the writ and a notice that it is attached in pursuance of such writ. Personal property not capable of manual delivery, which is in the hands of the defendant to the attachment suit, is as much liable to attachment as if in the hands of a third person."

Although the manner in which growing crops are to be levied upon is thus plainly pointed out—viz., by garnishment—yet it would seem (from the nature of the property, its exposed condition, and the fact that it may be subject to injury or destruction by maliciously inclined persons where it is protected merely by the service of a writ), not only proper but advisable on the part of the officer and plaintiff to place a keeper in charge of the property. As the plaintiff's attorney is not authorized to direct the sheriff to incur such an expense, the direction should be given by the plaintiff or an agent lawfully authorized to act in such matters for him. (See *Sec. 252, ante.*)

§ 312. **Growing Crops Mortgaged—Continuance of Lien.**—"The lien of a mortgage on a growing crop continues on the crop after severance, whether

remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor." (*California. Sec. 2972 Civil Code.*)

In Nevada the lien of a mortgage upon a growing crop continues until after the crop is harvested and threshed or baled or otherwise prepared for market and delivered to the mortgagee or his order. (*Sec. 2635 General Statutes, 1885.*)

§ 313. **Farming on Shares—Attachable Interest.**—Where two persons who are tenants in common, the one farming the land of the other, under an agreement by which the former is to give the owner of the land a part of the crop raised for his own use, a contract may be entered into between them, by which the one who performs the work becomes divested of an attachable interest until the conditions of the contract have been complied with. In the case of *Howell vs. Foster*, 65 Cal. 169, the court say:—

"There is no doubt that where one man farms land of another under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crops raised. But it is just as clear that the agreement between the parties may be so framed as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition. (*Wentworth vs. Miller*, 53 Cal. 9; *Andrew vs. Newcomb*, 32 N. Y. 419; *Lewis vs. Lyman*, 22 Pick. 437; *Ponder vs. Rhea*, 32 Ark. 435; *Smith vs. Atkins*, 18 Vt. 461.) In the present case the parties expressly agreed that all of the grain raised on the land by Mayfield should be delivered to the plaintiff and remain his property,

and in no way subject to the disposal of Mayfield until all of such advances as the plaintiff may have made him had been satisfied, and he had thereupon received from the plaintiff his share of the grain, which plaintiff bound himself to deliver. Until all this happened, all of the grain, by the express contract of the parties, was to be and remain the property of the plaintiff, and in no way subject to the disposal of Mayfield. That it was competent for the parties so to provide has already been shown, and having so provided, it results that Mayfield had no attachable interest in the grain at the time of the levy of the writs in question. 'It is a fundamental principle,' says Drake on Attachment, Sec. 245, 'that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.' See, also, authorities cited in support of the text, and *Tuohy vs. Wingfield*, 52 Cal. 319."

§ 314. **Attachment of Crop after Severance.**—An attachment upon a crop after severance is levied by taking the property into the possession of the officer; but if the crop is still subject to the lien of a valid crop mortgage, the provision requiring payment or tender of the mortgage debt to the mortgagee is applicable. (*California. Secs. 2955, 2969 Civil Code.*)

§ 315. **Attachment of Pledged Property.**—Under the California Code provisions (see Secs. 232, 216, *ante*), it is held that while the interest of a pledgor

in the property pledged is subject to attachment and may be reached in the hands of the pledgee, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge. (*Treadwell vs. Davis*, 34 Cal. 601.) Property pledged is thus held to be property not capable of manual delivery. It will be noticed, however, that, under the present provision, the persons garnisheed and also the defendant may be examined under oath, pending the attachment, and "the court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same." (*California. Sec. 545 Code Civil Procedure.*)

In Arizona it is expressly provided that "where the defendant has an interest in personal property, but is not entitled to the possession thereof," a levy is made by garnishment. (*Secs. 1906, 55 Revised Statutes, 1887.*)

In Colorado, after payment by plaintiff of the amount due the pledgee, the property must be delivered to the sheriff by the garnishee. (*Sec. 135 Civil Code, Acts 1887, p. 137.*)

§ 316. **Pledge of Goods—Rights of Pledgee.**—Under the California Practice (*Secs. 542, 544-5, 688, Code Civil Procedure*), while the interest of the pledgor of property is subject to execution, yet this cannot be done by seizure of the pledge, but only by enforcing a garnishment on the pledgee. (*Treadwell vs. Davis*, 34 Cal. 601.)

When pledged property is allowed to go back into the possession of the pledgor, it is subject to attach-

ment by his creditors. (*Salinas City Bank vs. Graves*, 79 Cal. 192.)

Personal property in the hands of a bailee may be attached, all rights of the bailee being, however, preserved. (*Humphreys vs. Hopkins*, 81 Cal. 551.) See also Section 315.

§ 317. **Prior Liens Must Be Satisfied.**—An officer cannot take property belonging to the defendant in the writ, from the possession of a third party who has a lien upon the property, without first satisfying the claim of the lien. This principle applies to all valid subsisting liens dependent upon possession, whether such liens originate in the common law or are statutory. When the officer finds, therefore, that the property which he is instructed to attach is subject to any such lien for repairs, storage, feed and pasturage, board and lodging or the like, he should notify the plaintiff in attachment and decline to seize the property unless money is advanced sufficient to release the lien.

§ 318. **Liens upon Personal Property—California.**—(a) *For Repairs.*—“A person who makes, alters or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid.”

(b) *For Safe Keeping, etc.*—“Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by labor or skill employed for the protection, improvement, safe keeping or carriage thereof, has a special lien thereon, dependent on possession, for the compen-

sation, if any, which is due to him from the owner for such service; and livery, or boarding, or feed-stable proprietors and persons pasturing horses or stock have liens dependent on possession for their compensation in caring for, boarding or pasturing such horses or stock."

(c) *For Purchase Price*.—"One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price."

(d) *Factor's Lien*.—"A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal."

(e) *Banker's Lien*.—"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

(f) *Shipmaster's Lien*.—"The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages."

(g) *Seaman's Lien*.—"The mate and seaman of a ship have a general lien, independent of possession, upon the ship and freightage, for their wages, which is superior to every other lien."

(h) *Officer's Lien*.—"An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the

property is had." (*California. Secs. 3049-57 Civil Code.*)

§ 319. **Liens in Other States.**—A reference is also here given to statutory liens upon personal property, existing in other states.

Arizona. Secs. 2279, 2289-91 Rev. Stats., 1887.

Colorado. Secs. 1407, 2854-6, 4274, 4325 Mills' Ann. Statutes, 1891.

Idaho. Secs. 3445-9 Revised Statutes, 1887.

Montana. Secs. 206-8, 1394 General Laws; Compiled Statutes, 1887, p. 1035.

Nevada. Secs. 3825, 3828, 3832 Gen. Stats., 1885.

Oregon. II Hill's Codes, 1892, pp. 1596-8.

Utah. Secs. 2954-7 Compiled Laws, 1888.

Washington. Secs. 1699, 1705 I Hill's Codes, 1891.

§ 320. **Lien for Cutting Timber, etc.**—Under the California statute, a person who cuts timber and manufactures it into ties under employment of the owner of the land, and who piles the same and remains in possession, has a lien thereon for the sum due him thereon, and he may retain possession, as against an officer with execution or attachment against the owner of the land, until his charges are paid. (*Douglass vs. McFarland, 92 Cal. 656.*)

§ 321. **Waiver of Lien.**—When a person who has goods in his possession states to one who is about to take possession of the same, by a legal process, that he has no charges on the goods, this is a waiver of his lien for charges, if any he had. (*Blackman vs. Pierce, 23 Cal. 509.*)

§ 322. **Sale before Judgment—Perishable Property.**—Statutory provision is made for the sale of attached property before judgment in cases where the property is perishable, or its keeping would be attended with great expense, or the interest of the parties would be subserved by such sale. In some states an order of court is required in some cases, and the statutory manner of noticing and conducting the sale is usually the same as of similar property on execution.

In California, "if any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment." (*California. Sec. 547 Code Civil Procedure.*) Notices of the time and place of sale should be posted in three public places of the township, or city (as the case may be), where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

"Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action." (*California. Sec. 548 Code Civil Procedure.*)

All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. Sales

by order of the court must be made by posting written notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days, except where the time of sale is fixed in the order of the court. (*California. Secs. 692, 694 Code Civil Procedure.*)

An officer selling without giving the statutory notice forfeits \$500 to the aggrieved party, in addition to his actual damages. (*California. Sec. 693 C. C. P.*)

Arizona. Secs. 59-61 Revised Statutes, 1887.

Colorado. Sec. 107 Code Civil Procedure.

Idaho. Sec. 4312 Revised Statutes, 1887.

Montana. Sec. 192 Code Civil Procedure.

Nevada. Sec. 3155 General Statutes, 1885.

Oregon. Sec. 153 I Hill's Codes, 1892.

Utah. Sec. 420 Code Civil Procedure.

Washington. Sec. 303 II Hill's Codes, 1891.

CHAPTER XI.

ATTACHMENT OF REAL PROPERTY.

- § 323. Attachment of Real Property—Arizona.
- § 324. California and Idaho.
- § 325. Colorado.
- § 326. Montana.
- § 327. Nevada.
- § 328. Oregon.
- § 329. Utah.
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- § 331. Service on Occupant.
- § 332. Absence of Occupant of Premises.
- § 333. Failure to Find Record Owner.
- § 334. Posting Copy on Real Estate.
- § 335. What Constitutes Complete Attachment.
- § 336. Lien on Real Estate, When Takes Effect.
- § 337. Sufficiency of the Return.
- § 338. How Attachment May Be Released.

§ 323. **Attachment of Real Property—Arizona.**

—The levy of the writ of attachment is made by filing a copy of the writ, together with a description of the property attached, with the county recorder, and indorsing such levy upon the original writ. The officer need not go upon the ground. (*Secs. 55, 1905 Revised Statutes, 1887.*) Secs. 21–24 of the statute relating to executions are also applicable to the levy, and are to be found in Sec. 233 of this work, *ante*.

§ 324. **California and Idaho.**—The manner of levying the writ of attachment upon real property is as follows:—

"1. Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

"2. Real property, or any interest therein, belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person, (naming him) are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property."

California. Sec. 542 Code Civil Procedure.

Idaho. Sec. 4307 Revised Statutes, 1887.

§ 325. **Colorado.**—Real property standing upon the records of the county in the name of the defendant, is attached by filing a copy of the writ, together with a

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description of the property attached, with the recorder of the county. Real property, or any interest therein, belonging to the defendant and held by any person, or standing upon the records of the county in the name of any other person (but belonging to the defendant), is attached by leaving with such person, or his agent, a copy of the writ and a notice that such real property (giving a description thereof) and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county. (*Sec. 104 Code Civil Procedure.*)

§ 326. **Montana.**—Real property is attached by filing with the recorder a copy of the writ, together with a description of the property and a notice that it is attached. Any interest belonging to the defendant, but standing in the name of another person, is attached in a similar manner, without posting or service upon the occupant. (*Sec. 186 Code Civil Procedure.*)

§ 327. **Nevada.**—Real property is attached by leaving a copy of the writ with the occupant thereof, or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county. (*Sec. 128 Civil Procedure Act; General Statutes, 1885, Sec. 3150.*)

§ 328. **Oregon.**—Real property is attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff. (*Sec. 149 I Hill's Codes, 1892.*)

§ 329. **Utah.**—In this Territory the writ is levied in the same manner as in California. (*Sec. Sec. 324, ante; Sec. 415 Utah Code of Civil Procedure.*)

§ 330. **Washington.**—Real property is attached by filing a copy of the writ, together with a description of the property attached, with the county auditor of the county in which the attached real estate is situated. (*Sec. 300 II Hill's Codes, 1891.*)

§ 331. **Service on Occupant.**—Under a statute requiring service of a copy of the writ upon the occupant, if any, as in California and Oregon (*Secs. 324, 328 ante*), it is not necessary to go to the land if an occupant can be served with a copy of the writ, description and notice, without going to the land. It is not necessary to serve the defendant with a copy of the writ, description and notice, except he be the occupant of the land attached. A person may be an occupant of real estate although there be no buildings upon it. He may occupy the bare land for the storage of hay, or any other commodity. If he be an occupant in any capacity, he is entitled to notice of the levy, and a service upon him will be a service upon an occupant within the law. The service of the writ, description and notice upon an occupant (if there is one) is made by personally delivering to and leaving the copy with the occupant. (See also *Sec. 332, post.*)

§ 332. **Absence of Occupant.**—When the statute requires service of a copy of the writ upon the "occupant of the property, if there be one," otherwise, posting of the papers, if the officer finds no occupant "easily discoverable" or "visibly occupying the property" at the time of his visit, he should make the levy by posting without delay, although there be on the property a dwelling house apparently tenanted. (*Davis vs. Baker, 72 Cal. 494.*)

§ 333. **Failure to Find Record Owner.**—When the person, who is not the defendant, and in whose name the property stands on the records, is not in the county, and has no agent in the county, and neither he nor any agent of his has a residence in the county, and the service contemplated in the statute cannot thus be made, the attachment will not for that reason be invalidated, but such facts should be set out in the return made by the officer on the writ.

§ 334. **Posting Copy on Real Estate.**—If there is no fence or building upon the land attached, the posting, when required by the statute, may be done by setting a post or stake in the ground and attaching thereto the copy of the writ, description and notice.

§ 335. **What Constitutes Complete Attachment.**—To complete the service and create a lien, all the acts required by law must be performed. Neither act, by itself, will amount to a service of the attachment and create a lien on the property. The performance of all these acts is essential to create a lien, and the omission of either act is fatal to the creation of the lien. (*Wheaton vs. Neville*, 19 Cal. 44; *Main vs. Tappence*, 42 Cal. 209.) When the statute requires service upon the occupant or posting upon the premises, the levy is incomplete and ineffectual unless such requirement be complied with. (*Maskell vs. Barker*, 99 Cal. 642; *Watt vs. Wright*, 66 Cal. 202.) But, in addition to this, the requisite acts should be performed in the order in which they are named in the code; that is to say, under the California practice the filing of a copy with the recorder must precede the service on an occupant or the posting on the premises.

In *Wheaton vs. Neville*, *ante*, the court said that after the return of the writ the sheriff has no authority to take any proceedings for the completion of the attachment, which he has previously omitted. Its efficacy, as a warrant of authority to him, is limited to acts performed while it remains in his possession.

§ 336. **Lien on Real Estate, When Takes Effect.**—The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and a deposit of a copy of the writ, together with a description of the land attached, with the county recorder; that is, as soon as all the statutory requirements have been complied with. (*Ritter vs. Scannell*, 11 Cal. 239.)

Under the old law, in California, the service on the occupant or posting on the property was required to be done before filing with the recorder. The practice is reversed under the present law.

Such lien cannot be diverted by the failure of the sheriff to make a proper return of the writ.

Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. (See *Sec. 337, post.*) The deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. (*Ritter vs. Scannell*, 11 Cal. 239.)

§ 337. **Sufficiency of the Return.**—If the return of the sheriff certifies generally that he attached certain real property, and further specifies certain acts which are insufficient to make a valid levy, the general return

of service is sufficient to charge a subsequent purchaser with notice of the omitted facts, if the service was in fact complete. To support an execution sale, the omitted facts may be shown by parol evidence of the officer, which evidence must be clear and satisfactory. (*Brusie vs. Gates*, 80 Cal. 462.)

When the statute requires that papers be posted "in a conspicuous place on the premises," a return showing a posting "on the premises" is *prima facie* sufficient to support the levy. (*Davis vs. Baker*, 72 Cal. 494.)

§ 338. **How Attachment May Be Released.**—Until the year 1876 there was no method prescribed by statute in California for the release of an attachment upon real estate on the records of the county in which the property was situated. At the session of the Legislature in that year, a clause was added to Sec. 559 of the Code of Civil Procedure, providing that "when-ever an order has been made discharging or releasing an attachment on real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner." It then became quite generally the custom, among sheriffs and constables, to release attachments upon real property by filing with the county recorder a certified copy (certified by the officer) of the order of plaintiff's attorney to release the attachment; and in the case of *Smith vs. Robinson*, 64 Cal. 387, the Supreme Court held that a plaintiff, without order of court, may direct the sheriff to release real property attached. See also:

Idaho. Sec. 4324 Revised Statutes, 1887.

Oregon. Sec. 151 I Hill's Codes, 1892.

Washington. Sec. 321 II Hill's Codes, 1891.

CHAPTER XII.

EXECUTION—GENERALLY.

- § 339. Property and Rights Subject to Execution.
- § 340. How Levy Is Made, Generally.
- § 341. Within What Time Execution May Issue.
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- § 343. Execution after Time Limited—Recall.
- § 344. Transcripts from Justices' Courts.
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- § 392. Foreclosure of Mortgages and Other Liens.
- § 393. Execution against Corporation for Fine.
- § 394. Justices' Court Executions.
- § 395. Power of Justice over His Judgments.
- § 396. Enjoining Justice's Judgment.
- § 397. Execution to Constable—Levy by Sheriff.
- § 398. Decisions.

§ 339. **Property and Rights Subject to Execution.**—All property of the judgment debtor, not expressly by law made exempt from execution, is subject to execution and forced sale. The principle is laid down in the California Code of Civil Procedure (*Sec. 688*) as follows: "All goods, chattels, moneys and

other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution."

Similar provisions exist in other states under their codes or statutes on the subject.

Arizona. *Laws of 1889, p. 39, Sec. 8.*

Idaho. *Sec. 4477 Revised Statutes, 1887.*

Montana. *Sec. 319 Code Civil Procedure.*

Nevada. *Sec. 3241 General Statutes, 1885.*

Oregon. *Sec. 282 I Hill's Codes, 1892.*

Utah. *Sec. 567 Code Civil Procedure.*

Washington. *Sec. 479 II Hill's Codes, 1891.*

§ 340. **How Levy Is Made, Generally.**—The sheriff must execute the writ "by levying upon a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment." (*California. Sec. 691 Code Civil Procedure.*) In other states similar provisions prevail. For manner of making levy, see Chapters XIII and XIV, *post*.

Idaho. *Sec. 4481 Revised Statutes, 1887.*

Montana. *Sec. 331 Code Civil Procedure.*

Nevada. *Sec. 222 Code Civil Procedure.*

Oregon. *Sec. 283 I Hill's Codes, 1892.*

Utah. *Sec. 571 Code Civil Procedure.*

Washington. *Sec. 496 II Hill's Codes, 1891.*

§ 341. **Within What Time Execution May Issue.**—Under the California practice, the party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execu-

tion issued for its enforcement. This applies to Superior and Justices' Courts. In all cases other than for the recovery of money, in the Superior Court, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings. (*Secs. 681, 685, 901 Code of Civil Procedure.*) In Oregon the time is fixed at ten years, and in Montana, six years. In the other states named below the five-year limitation prevails.

Arizona. Statutes 1891, p. 55.

Colorado. Acts 1891, p. 247.

Idaho. Secs. 4470, 4474 Revised Statutes, 1887.

Montana. Secs. 312, 349 Code Civil Procedure.

Nevada. Secs. 3233, 3580 General Statutes, 1885.

Oregon. Sec. 292 C. C. P. as amended, 1893.

Utah. Secs. 560, 564 Code Civil Procedure.

Washington. Secs. 462-4, 1544 II Hill's Codes, 1891.

§ 342. Same Limit in Foreclosure Cases.—

The statute limiting the time for issuing execution upon a judgment to five years after its entry, applies to judgments rendered in suits to foreclose a mortgage or other lien equally as to mere personal judgments. (*Stout vs. Macy, 22 Cal. 647; Dorland vs. Hanson, 81 Cal. 202.*)

§ 343. **Execution after Time Limited—Recall.**—If an order be made granting an execution after the lapse of the statutory limit, such order will be annulled on *certiorari*. (*Cortes vs. Superior Court, 86 Cal. 274.*)

When an execution has been improperly issued after

the expiration of the time allowed by law for its issuance, the court may recall the same and order the sheriff to refund money collected thereon by him. (*McMann vs. Superior Court*, 74 Cal. 106.)

§ 344. **Transcripts from Justices' Courts.**—

The filing and docketing of a transcript of a judgment rendered by a justice of the peace in the office of the clerk of the county, does not empower the clerk of the court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition. (*Kerns vs. Graves*, 26 Cal. 156.)

§ 345. **Execution after Death of a Party.**—

“Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:—

“1. In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest.

“2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.” (*California. Sec. 686 Code Civil Procedure.*)

“If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands.” (*California. Sec. 1505 Code Civil Procedure.*)

In Arizona execution may issue after the death of the defendant only in actions for the recovery of real or personal property, or for the enforcement of a lien thereon.

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Arizona. Sec. 6, p. 38, *Statutes*, 1889.

Colorado. Sec. 2570 *Mills' Ann. Stats.*, 1891.

Idaho. Sec. 4475 *Revised Statutes*, 1887.

Montana. Sec. 317 *Code Civil Procedure*.

Nevada. Sec. 3239 *General Statutes*.

Oregon. Sec. 281 *I Hill's Codes*, 1892.

Utah. Sec. 565 *Code Civil Procedure*.

Washington. Sec. 472 *II Hill's Codes*, 1891.

§ 346. **Execution before Entry of Judgment.**

—An execution issued upon a valid judgment is sufficient authority to the sheriff to make a sale of lands. In the case of *Los Angeles Bank vs. Raynor*, 61 Cal. 145, it was urged that the record showed that the judgment was not entered when the execution was issued, but the court held that it was not necessary that it should have been; that the enforcement of a judgment does not depend upon its entry or docketing; that these are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised or in which the judgment may be enforced, and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. But "neither is necessary for the issuance of an execution which has been duly rendered. Without docketing or entry, execution may be issued on the judgment, and land levied upon and sold (*Hastings vs. Cunningham*, 39 Cal. 144); and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it."

§ 347. **Receipt of Writ.**—The receipt of a writ by the officer dates from the time he indorses it as re-

ceived. A writ may be handed to a sheriff and he may refuse to "receive" it until his fees for service be paid. Before "receiving" the writ and indorsing upon it the time of its reception, the officer should examine it to satisfy himself that it is regular on its face. For it may sometimes happen, in the hurry of issuing a writ, that some feature essential to its validity may have been omitted by the clerk, and the omission have passed unnoticed by the person to whom it was delivered.

§ 348. **Writ Cannot Be Received on Sunday.**—In the absence of statutory authority, a writ of attachment or execution, placed in the sheriff's hands on Sunday, cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. (*Whitney vs. Butterfield*, 13 Cal. 335.) See also *Sec. 213 ante*.

§ 349. **What the Writ Must Require.**—The writ of execution issued out of the Superior Court must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof and the amount actually due thereon, and if made payable in a specified kind of money or currency, the execution must also state the kind of money or currency in which the judgment is payable. (*California. Sec. 682 Code Civil Procedure.*)

Arizona, Stats. 1889, p. 37, Sec. 2.

Idaho, Sec. 4471 Revised Statutes, 1887.

Montana, Sec. 313 Code Civil Procedure.

Nevada, Sec. 3234 General Statutes, 1885.

Oregon, Sec. 276 I Hill's Codes, 1892.

Utah, Sec. 561 Code Civil Procedure.

Washington, Sec. 467 II Hill's Code, 1891.

§ 350. **Delay in Service of Writ Inexcusable.**

—The terse maxim, "Delays are dangerous," finds significant application in nearly all duties of the sheriffs and constables. It conveys an admonition which should never be lost sight of from one year's end to another. The evil of procrastination has subjected many an officer to loss, and they who are subject to it as a habit must prove unfitted for the discharge of the important duties that devolve upon them as officers. Some pertinent suggestions on this point are to be found in the decision quoted in Sec. 26, *ante*.

An illustration in point (and there are many more on record in the courts) may be found in the case of *Howe vs. Union Insurance Co.*, 42 Cal. 528, wherein the plaintiff was subjected to a loss of \$1,465, by reason of the neglect of an officer to serve a garnishment under an execution which had been placed in his hands. Howe commenced an attachment suit against one McCann, and garnisheed money of McCann's in the defendant's hands, and afterwards recovered judgment and issued execution to the sheriff. The officer went to the office of the insurance company for the purpose of collecting the money. The secretary of the company admitted having the money, but did not pay it over. The sheriff did not levy the execution, supposing that the money would be paid in a day or two. Before any further step had been taken, and within less than four months from the time when the attachment was issued and served, proceedings were commenced to have McCann declared a bankrupt. At that time

the bankrupt law provided that all attachments upon mesne process within four months before the proceedings in bankruptcy, should be thereby dissolved, in case the defendant in the attachment be declared a bankrupt. Under that provision it is clear that if the execution had been levied upon the fund before the proceedings in bankruptcy were commenced, he would have acquired a lien upon the fund, which would not have been divested by the proceedings in bankruptcy. As it was, the money went to the assignee in bankruptcy, and Howe was obliged to take merely his pro rata with the other creditors. The sheriff's proper course in the premises was to have served a garnishment upon the insurance company, and demanded possession of the money.

§ 351. **Penalty for Neglect to Levy.**—"If the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he is liable to the creditor for the value of such property." (*California. Sec. 4180 Pol. Code.*)

§ 352. **Void and Voidable Writs.**—Before making levy, the officer should satisfy himself by examination of the writ that it is regular on its face. The decisions of the courts differ widely as to the responsibility of an officer in executing void and voidable writs. If a writ is not regular on its face, he may return it to the party who delivered it to him, who must take it for correction to the officer who issued it, if the error is such that correction can be made. A writ is not regular on its face if it is not issued in the

name of the people, nor (if a Superior Court writ) if it has no seal. The word "seal" includes an impression of the seal required to be used upon the paper alone as well as upon wax or a wafer affixed thereto. If the writ is subscribed by a deputy clerk and not by his principal, it does not comply with the law, which provides that it must be subscribed by the clerk. Executions that are not regular on their face are liable to be vacated; and, although irregular and voidable in some instances, where they are issued upon a valid judgment, the officer cannot refuse to make a levy.

§ 353. **Irregularities in Writ or Proceedings.**

—When an execution is placed in the sheriff's hands, he is not bound to inquire whether there is a judgment to support it, or whether the execution corresponds exactly with the judgment. If it be regular on its face, it is his duty to execute it. But, although "a sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued" (*California. Sec. 4187 Political Code*), yet, if he know of any irregularity in those proceedings, he will put himself in jeopardy the moment he proceeds to execute the writ. The assurance of protection to the officer implied in the section here quoted is to be found in nearly all works that treat upon or refer to the duties of ministerial officers, and yet there are perhaps but few such officers who have not at some time or other found themselves in the position of party defendant in vexatious and expensive suits, by blindly relying upon the unqualified promise contained therein. No legislative assurance of protection to an officer for

serving process illegally issued can divest a party aggrieved by reason of such service from his right to seek his remedy in the courts against the officer. After an officer has been brought into court in an action against him for taking property under an illegal process, he may or may not be able to justify himself and avert the penalties prescribed for willful wrongdoers, but his justification will then have come too late to shield him from the annoyances and expense of a defense. (See also *Secs. 56, 204, 352, 377.*)

§ 354. **Execution—When Void.**—Executions not under seal, issued from a court which has been abolished, or is not of competent jurisdiction, or upon a void judgment, or upon a judgment against an administrator, or after the death of the judgment debtor, or after an appeal and stay, instanced by the court as probable examples of void executions. (*Hunt vs. Loucks, 38 Cal. 372.*)

§ 355. **When Voidable.**—If an execution directs the levy for more money than the judgment calls for, it is not for that reason *void*, but only *voidable*. Executions which have been issued according to the established course of practice, and are not so erroneous that they cannot be amended, are not void. (*Hunt vs. Loucks, 38 Cal. 372.*)

§ 356. **When Amendable.**—If an execution calls for too much money, it will not be set aside, but amended, so as to agree with the judgment, upon the application of the parties to it, or either of them. (*Hunt vs. Loucks, 38 Cal. 372.*)

An execution which is not issued in the name of the

people, or directed to the sheriff, is amendable, and therefore not void, but only voidable, and a sale under it is valid. (*Hibberd vs. Smith*, 50 Cal. 511.)

§ 357. **Irregular Writ—Duty of Officer.**—If an irregular or imperfect execution is amendable, it is not void, but only voidable, and it is the duty of the sheriff to serve and return it. (*Van Cleave vs. Bucher*, 79 Cal. 600.)

The court has no power to make an order directing a sheriff to enforce an execution by levying on a particular piece of property. (*Fraser vs. Thrift*, 50 Cal. 476.)

The plaintiff, in an action of ejectment, relied upon an execution sale, to which neither he nor the defendant was a party. The execution called for \$695 more than the judgment, but corresponded with it in other respects: *Held*, that the execution was not void, but voidable only, and the sale therefore valid. (*Hunt vs. Loucks*, 38 Cal. 372.)

If the execution calls for the amount of the judgment in the court below, and for the costs of an appeal also, it is not, for that reason, irregular. *Id.*

A sale made under a valid, though erroneous judgment, which has not been reversed or set aside, is valid. (*Moore vs. Martin*, 38 Cal. 428.)

If an officer receives an execution, and he knows that the judgment has been satisfied, he cannot levy thereunder.

If an execution correctly refers to a judgment, in such manner as to identify it, it is sufficient to justify the sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. (*Franklin vs. Merida*, 50 Cal. 289.)

§ 358. **Sales—When Valid and When Void.**—Sales to a *bona-fide* purchaser under *voidable* executions are *valid*, though the executions be afterwards set aside, but sales under *void* executions are invalid and pass no title, even to a *bona-fide* purchaser.

§ 359. **Not Open to Collateral Attack.**—Executions which are merely voidable cannot be attacked collaterally even by the parties to them, much less by strangers. (*Hunt vs. Loucks*, 38 Cal. 372.)

§ 360. **When Sheriff May Levy on Real Property.**—In the absence of any statute to the contrary, the sheriff may, on the request of the defendant in execution, properly levy on real estate, though there be personal property present amply sufficient to satisfy the execution. (*Smith vs. Randall*, 6 Cal. 52.) The request should be in writing.

§ 361. **Judgment Set Aside after Levy.**—If an execution is regularly issued on a valid judgment, entered on a default, and the sheriff levies on property by virtue of the same, and retains it several days, until the default is opened and the judgment set aside, and then returns it to the defendant, the plaintiff is not liable in damages for the seizure and detention of the property, if he acted without fraud. (*White vs. Adams*, 52 Cal. 435.)

§ 362. **Staying Execution.**—If a judgment upon which an execution issues and the execution itself are void upon their face, the court has power on motion to afford relief, and can arrest the process. (*Sanchez vs. Carriaga*, 31 Cal. 170.)

Notice of a motion to set aside an execution and a

levy made thereunder will not operate as a stay of proceedings. (*Byran vs. Berry*, 8 Cal. 130.) On this point the court say: "We think the District Court did not err in overruling the motion to set aside the execution and levy. The notice that a motion would be made did not operate as a stay of proceedings. After giving the notice, the defendant should have procured an order staying the sale under the execution until his motion could have been heard. (*Greenup vs. Brown*, Breese 193; *Beard vs. Foreman*, Breese 385; *Robinson vs. Chisseldine*, 4 Scam. 333.)

Where third parties have purchased at an execution sale, it is too late to move to set aside the execution.

An undertaking for costs and damages under Section 941 Code Civil Procedure, California, stays proceedings on an appeal in all cases, except those specified in Sections 942-5; and it was held, in *Root vs. Bryant*, 54 Cal. 183, that upon an appeal from a judgment for the foreclosure of a lien and the sale of the property subject thereto—the appeal being taken by a lien holder, not in possession of the land, whose lien was adjudged subordinate to the lien foreclosed—that the undertaking for costs and damages stayed the judgment.

§ 363. **Sheriff Cannot Sell When Stay Is Ordered.** A sheriff who sells property on an execution issued by a justice of the peace, after the justice has notified him that a writ of *certiorari* has been issued, and commanded him to stay all proceedings upon the execution, is liable for the value of the property. (*Spencer vs. Long*, 39 Cal. 700.)

§ 364. **Quashing Execution.** Upon the quashing of an execution, the officer is bound to return the

property levied upon to the defendant unless he have other writs in hand. In the case of *Wellington vs. Sedgwick*, 12 Cal. 470, the defendant, as sheriff, having an execution against Stevens & Markley, levied it upon certain goods, the property of Stevens & Markley, and placed them in the hands of Wellington, as keeper, and subsequently the execution was quashed, having been issued without seal; and between that time and the issue and levy of a new execution, Wellington, who still remained in possession of the goods, purchased the goods of Stevens & Markley. The court held that such purchase was valid, and vested the property in Wellington. Upon the levy of the execution, the property vested in the sheriff for certain purposes; his title was only a qualified title, which was defeated by the quashing of the execution. The title then returned to Stevens & Markley; they could discharge the sheriff from the duty of returning the property to them, which they did by the sale to Wellington.

§ 365. **How Writ Is Executed.**—"The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such parts of the property as the judgment debtor

may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs." (*California. Sec. 691 Code Civil Procedure.*) See also *Sec. 357 ante*. Compare:

Arizona. Laws of 1889, p. 40, Sec. 12.

Colorado. Secs. 108-9 Code Civil Procedure.

Idaho. Sec. 4481 Revised Statutes, 1887.

Montana. Sec. 331 Code Civil Procedure.

Nevada. Sec. 3234 General Statutes, 1885.

Oregon. Sec. 283 I Hill's Codes, 1892.

Utah. Sec. 571 Code Civil Procedure.

Washington. Sec. 496 II Hill's Codes, 1891.

§ 366. **Levy of Execution—California.**—The levy of the writ of execution is made in the same manner as the levy of a writ of attachment (*Sec. 688, 542 Code of Civil Procedure*). The code provisions as to the manner of making levy are to be found in Sections 399 and 436 of this work. "If property of the judgment debtor has already been attached in the same action, the sheriff must satisfy the execution out of the property attached by him which has not been delivered to the defendant, or a claimant thereto, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose.

"1. By paying the plaintiff the proceeds of all sales of perishable property sold by him, or any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

"2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if

enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution." (*Sec. 550 Code Civil Procedure.*)

If personal property is already held under attachment, the levy of the execution is made by indorsing upon the writ the time of its receipt and a memorandum or certificate of the fact of levy upon the attached property.

§ 367. **Levy in Other States.**—In other states the code or statutory provisions are substantially the same as in California. Compare:

Arizona. Laws of 1889, p. 39, Sec. 9.

Colorado. Sec. 108 Code Civil Procedure.

Idaho. Secs. 4477, 4315 Revised Statutes, 1887.

Montana. Secs. 319, 194 Code Civil Procedure.

Nevada. Secs. 219, 135 Code Civil Procedure.

Oregon. Secs. 283, 157 I Hill's Codes, 1892.

Utah. Secs. 423, 567 Code Civil Procedure.

Washington. Secs. 312, 496 II Hill's Codes, 1891.

§ 368. **Levy of Execution—Proceedings Upon.**
—The provisions of the codes of Oregon and Washington as to the execution of judgments against property, and which are identical in both these States, set forth in detail how the writ is to be executed; and as the same procedure is substantially followed in those states where the statute is less explicit, the code sections referred to are given in full in the next section.

§ 369. **Oregon and Washington.**—In these States levy of execution against the property of the judgment debtor is made as follows:—

"1. If property has been attached, he shall indorse on the execution and pay to the clerk forthwith the amount of the proceeds of sales of perishable property or debts due the defendant received by him sufficient to satisfy the judgment.

"2. If the judgment is not then satisfied, and property has been attached and remains in his custody, he shall sell the same, or sufficient thereof to satisfy the judgment.

"3. If then any portion of the judgment remains unsatisfied, or if no property has been attached, or the same has been discharged, he shall levy on the property of the judgment debtor sufficient to satisfy the judgment.

"4. Property shall be levied on in like manner and with like effect as similar property is attached.

"5. Until a levy, personal property shall not be affected by the execution. When property has been sold or debts received by the sheriff on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, as commanded in the writ.

"6. When property has been attached, and it is probable that such property will not be sufficient to satisfy the judgment, the execution may be levied on other property of the judgment debtor without delay. If, after satisfying the judgment, any property, or the proceeds thereof, remain in the custody of the sheriff, he shall deliver the same to the judgment debtor."

Oregon. Sec. 283 1 Hill's Codes, 1892.

Washington. Sec. 496 11 Hill's Codes, 1891.

§ 370. **How Sale Should Be Conducted.**—In California all sales of property under execution must be made at auction to the highest bidder, between the

hours of nine in the morning and five in the afternoon. If the sale cannot be completed in one day, it may be postponed until the next day without posting notices of the postponement, if there are persons present to receive the proclamation of the postponement.

“After sufficient property has been sold to satisfy the execution, no more can be sold under that writ. Neither the officer holding the sale, nor his deputy, can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price. The judgment debtor, if present at the sale, may direct the order in which property shall be sold, when such property consists of several lots or parcels, or of articles which can to advantage be sold separately, and the sheriff must follow such directions.” (*Sec. 694 Code Civil Procedure.*) Compare:

Arizona. *Laws of 1889, p. 41, Sec. 15.*

Colorado. *Secs. 1849, 1862 General Statutes, 1883.*

Idaho. *Sec. 4484 Revised Statutes, 1887.*

Montana. *Sec. 334 Code Civil Procedure.*

Nevada. *Sec. 3247 General Statutes, 1885.*

Oregon. *Sec. 292 I Hill's Codes, 1892.*

Utah. *Sec. 577 Code Civil Procedure.*

Washington. *Sec. 501 II Hill's Codes, 1891.*

§ 371. **Penalty for Selling without Notice.**—

An officer selling without giving the statutory notice forfeits \$500 to the aggrieved party, in addition to his actual damages. (*California. Sec. 693 C. C. P.*)

The remedy against a sheriff for selling property on insufficient notice is confined to the statutory remedy.

(*Smith vs. Randall*, 6 Cal. 47; affirmed in 17 Cal. 626; also cited as authority in *Satterlee vs. San Francisco*, 23 Cal. 320; and see *Herzo vs. San Francisco*, 33 Cal. 140.) The statute provides an adequate remedy in such cases by an action against the officer, and the party aggrieved is entitled to no other remedy. The purchaser at such sale is not the "aggrieved party" within the meaning of the law. The parties to the execution are the "aggrieved parties." (*Kelly vs. Desmond*, 63 Cal. 517.)

In computing the time of giving notice of the sale, the day on which the sale is made should be excluded.

Arizona. Sec. 1932 Revised Statutes, 1887.

Nevada. Sec. 3246 General Statutes, 1885.

§ 372. **Sale after Return Day—When Valid.**

—A levy made at any time before the return day of the writ is good, but a levy made after the return day will not be good unless the delay has been caused by a stay of proceedings. Where property has been levied upon and there is not sufficient time between the date of the levy and the return day, the officer may nevertheless proceed to advertise and sell the property under the writ, and the sale will be valid. (*Freeman on Executions*, Sec. 106; 94 Cal. 221.)

§ 373. **Postponement of Sale.**—If there are no bidders when property is offered at sheriff's sale, the sale may be postponed from day to day or to a future day named; but where publication of the notice of sale is required to be made once a week, for instance, the publication must be continued every week with an additional postponement notice.

When the only bids made are palpably dispropor-

tionate to the value of the property, the officer should adjourn the sale. In the case of real property, the officer may be unable to judge of the sufficiency of the bid, for the reason that the property may be covered with mortgages. But in the case of personal property, an approximate estimate of its value may be arrived at by the officer. Inadequacy of price alone is sufficient to authorize a court to set aside a sale. A sale should be postponed where there are indications on the part of bidders of collusion to depreciate the sale to an unreasonable extent, or when the officer has reason to believe that he can realize more by a sale at a future day. See:

Oregon. Sec. 293 I Hill's Codes, 1892.

Washington. Sec. 502 II Hill's Codes, 1891.

§ 374. **Re-sale Where Bidder Refuses to Pay.**

—"If the purchaser refuses to pay the amount bid by him for property struck off to him, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction," and "when the purchaser refuses to pay, the officer may in his discretion thereafter reject any subsequent bid of such person." (*California. Secs. 695-6 Code Civil Procedure.*)

Arizona. Laws of 1889, p. 42, Sec. 16.

Idaho. Secs. 4485-6 Revised Statutes, 1887.

Montana. Secs. 335-6 Code Civil Procedure.

Nevada. Sec. 3248 General Statutes, 1885.

Utah. Secs. 578-9 Code Civil Procedure.

§ 375. **The Title the Purchaser Secures.**—A sale of personal property passes to the purchaser only

such title as the judgment debtor had on the day the attachment or execution was levied, and it transfers only what the debtor himself could have transferred. (*Lowenberg vs. Greenebaum*, 99 Cal. 165; *Freeman on Executions*, Sec. 112; Secs. 698-700 *Code Civil Procedure, California*.)

§ 376. **Judgment Payable in Money Only.**—A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, indorses it on the execution and then returns it satisfied, the return is not conclusive, and, perhaps, not *prima-facie* evidence of satisfaction, unless it shows some authority for receiving the note. (*Mitchell vs. Hackett*, 14 Cal. 661.)

§ 377. **Application of Proceeds—Conflicting Attachments.**—When a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. Where there are several attachments, and the officer receives notice that the senior attachment is defective, he should make inquiry thereon and satisfy himself that he can safely pay the money upon such senior attachment. For if he pay over money upon a void writ, he will be responsible to the plaintiffs under the junior writs, notwithstanding the fact he may urge in excuse, that the senior writ was regular upon its face.

It is not only a frequently quoted principle of law, but a statutory enactment, that "a sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face, and issued by competent authority, whatever may be

the defect in the proceedings upon which they were issued.”

However bright and clear the protective halo of light that is shed upon the officer's pathway in this broad and unambiguously worded declaration, officers frequently stumble into difficulties by serving process regular on their face, and issued by courts of competent authority. For it is an equally settled principle that no person can be divested of his rights, except by due process of law; and officers are often called upon to carry out the judgments of courts under the authority of writs regular on their face, which have been wrongfully issued. (See also *Sec. 353 ante.*)

In *Buffandeau vs. Edmundson*, 17 Cal. 441, the court say: “It is no part of the sheriff's duty to sit in judgment upon official acts and reform the errors or revise the orders of a judge.” Yet while a sheriff may not question the validity of a writ, he is bound to protect himself from loss sought to be put upon him while in the faithful discharge of his duties.

In an action on a sheriff's bond, in the case of *McComb vs. Reed*, 28 Cal. 281, judgment was rendered against the officer and his sureties for not applying moneys received under execution upon plaintiff's judgment. There were two writs of attachment, under which the property was taken, the money realized on the sale being applied to the junior writ. The reason assigned by the sheriff was that the complaint which was served with the summons in the first case did not set up a cause of action which would warrant the issuance of an attachment. The court held, notwithstanding, that the writ was not void, and that a sheriff who receives an attachment, regular on its face, cannot pay over the money obtained by him from the sale of prop-

erty levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue.

The application of an attaching creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving, to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. (*Dixey vs. Pollock*, 8 Cal. 543.)

§ 378. **Conflicting Process from Different Courts.**—One court cannot enjoin the process of another court of coördinate jurisdiction, much less seize the proceeds of such process. (*Weaver vs. Wood*, 49 Cal. 300.) If two attachments, issued out of different courts at different times, are placed in a sheriff's hands, and both are levied on the same personal property, and the court out of which the latest attachment issues, orders the property sold and the proceeds deposited with its clerk, and the sheriff obeys, and the money is paid to the second attaching creditor, the sheriff is liable to the first attaching creditor for the amount for which he recovers judgment, or for the amount of the proceeds, if less than the amount of the judgment. The court from which the second attachment issues may make an order of sale of the property, but it has no power to dispose of the fund arising from the sale, other than the surplus remaining after the claim of the first attaching creditor is satisfied. In the case of *Weaver vs. Wood*, the sheriff of Solano County had two attachments issued out of different courts, and by

order of the court from which the second attachment issued, sold the property and paid the money into the court, from which it was paid to the plaintiff in the second attachment. As a consequence, the sheriff was compelled to satisfy the first attachment out of his own pocket. On appeal, the Supreme Court decided that the sheriff, having both attachments in his hands, knew the extent of the demand of the first attaching creditor, and must be held to have known that the Fourth District Court could only deal with the excess of the proceeds of the sale over that demand. (*Weaver vs. Wood*, 49 Cal. 297.)

§ 379. **Payment into Court—Disobedience of Void Order.**—In the case of *Brown vs. Moore*, 61 Cal. 432, an application for a writ prohibiting the respondent from proceeding further in the matter of certain contempt proceedings against the petitioners, the court rendered the following opinion:—

“From the verified petition, it appears that during the month of April, 1882, sundry suits at law were commenced by divers persons, against one Bartlett, in the Justices’ Courts of Amador County, to recover certain moneys alleged to be due from Bartlett to the respective plaintiffs in those suits. Judgment passed for the plaintiffs therein, on which executions were issued and placed in the hands of the petitioners in the present proceedings, who are constables in and for the respective towns of Amador County, in which are established the Justices’ Courts that rendered the judgments. The executions thus issued and delivered to the petitioners were by them, as such constables, levied on certain personal property of Bartlett. On the 22d of May, 1882, a judgment was entered in the Superior

Court of Amador County against Bartlett and in favor of one Post, for a money demand; and on this judgment execution was issued on the same day and delivered to the sheriff of Amador County. The sheriff, on the 24th of May following, levied his writ by delivering to each of the constables (petitioners here) a copy of the same, together with a notice that all the property of the defendant (Bartlett) in their possession and under their control was attached in pursuance of such execution, and demanded of them the possession of the property. The constables refused to deliver the property to the sheriff, and the next day the latter returned the writ to the Superior Court, stating in his return, substantially, the facts as above given. On the 27th of May, on an affidavit made on behalf of Post, setting forth that the judgments rendered by the Justice's Court were void, the judge of the Superior Court made an order directing the constables to appear before him on the 29th of the same month and show cause why they should not surrender the property to the sheriff. On the day named they appeared and filed their several affidavits, declaring that they were not debtors of Bartlett's, nor had they any property of his other than that levied on and held by them under and by virtue of the executions first above mentioned. Thereupon, the judge refused to direct the constables to deliver the property to the sheriff, but on the same day entered an order in the following words: 'It is ordered, adjudged, and decreed that plaintiff herein (Post) is authorized to institute an action against each of said persons, to wit: C. L. French, constable; H. B. Templeton, constable; W. H. Brown, constable; and W. Payton, his deputy constable, to determine whether or not the said persons hold, and retain said property

adversely to the defendant—said suits to be commenced within thirty days from the date of this order. And it is further ordered that each of said constables is given leave to sell the said property in their possession belonging to said defendant under the alleged executions in their hands, and they, and each of said constables, is ordered to pay all the proceeds of said sales of property to the clerk of the court within ten days after the sale thereof.'

"A motion was subsequently made on behalf of the constables that that portion of the order of May 29th purporting to authorize them to sell the property in their possession under the writs of execution in their hands, and requiring them to pay the proceeds of such sales to the clerk of the Superior Court, be set aside on the ground that the court had exceeded its jurisdiction in so ordering. This motion was denied.

"The constables sold the property under and by virtue of the executions held by them, and applied the proceeds to their satisfaction, instead of paying them to the clerk of the Superior Court, as directed by the order of May 29th; and upon these facts being brought to the notice of the Superior Court, that court made an order to the effect that the constables be brought before the court at a time stated, and show cause why they should not be adjudged guilty of contempt of court in failing and refusing to pay the proceeds of the sales of the property to the clerk, and further directing a warrant of attachment to be issued and delivered to the sheriff, commanding him forthwith to arrest the constables and hold them in his custody, unless they should execute an undertaking in the sum of \$100 each for their appearance on the day named.

"The Superior Court, in making the orders com-

plained of by the petitioners, was proceeding under the supposed authority of Secs. 717 and 720 of the Code of Civil Procedure. Even if it be admitted that those sections have any application to an officer holding property of a judgment debtor by virtue of a legal process issued against him, neither of them confers on the court the power to order such property sold, nor to direct that the proceeds of it be paid to the clerk of the court. (*Hartman vs. Olvera*, 51 Cal. 501.) The Superior Court, therefore, exceeded its power in making the order requiring the petitioners to pay to the clerk of the Superior Court the proceeds of the property sold under the executions held by them against Bartlett. For the disobedience of that void order, the petitioners could not be lawfully punished for contempt. The proceedings looking to that end should, therefore, be arrested. (*Williams vs. Dwinelle*, 51 Cal. 422; *Quimbo Appo vs. The People*, 20 N. Y. 531.)

“Demurrer overruled.”

§ 380. **Senior and Junior Writ.**—When an officer has levied upon property, he may hold the same under subsequent writs that may come into his hands, so long as the first levy remains thereon. The receipt of subsequent writs operates as constructive levies upon the goods taken under the prior writ.

If a second execution be delivered to a sheriff after he has the defendant's goods in possession under the prior execution of another, the goods are bound by the second execution, subject to the first execution.

Where A and B issue separate executions, and both are levied upon the same property at different times, and the prior execution of A is set aside, B is

entitled to be paid as if he were the sole execution creditor.

When a second execution is levied upon certain goods, and the proceeds afterwards exhausted by the first execution, the sheriff's return of *nulla bona* upon the second execution is proper.

Where there are several writs of attachment levied upon property, the first writ levied holds the property to satisfy the judgment that may be recovered under that writ; and when an execution is issued against the property, whether it be in the case of the first attachment, or in any other, the property may be sold under such execution; but under whatever execution the property be sold, the judgment under the first attachment must be satisfied first, and the proceeds of the sale must be held by the officer for that purpose until the judgment under the first attachment is rendered, or the case otherwise disposed of. The judgments under the senior writs of attachment are to be satisfied in the order in which they are levied.

§ 381. **Payment of Proceeds of Sale.**—If the sheriff neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting his legal fees), the amount thereof, with twenty-five per cent damages and interest at the rate of ten per cent per month from the time of demand, may be recovered by such person. (*California. Sec. 4181 Political Code.*) In Oregon the sheriff is required to pay to the clerk of the court all moneys realized upon execution sales. (*Oregon. Sec. 296 1 Hill's Codes, 1892.*)

§ 382. **Surplus to be Returned to Defendant.**—When the lien of an attachment is satisfied, the property not disposed of in satisfaction of the lien, as well as the surplus moneys that may remain after the sheriff's sale and satisfaction of the debt, remain subject to the rights of the judgment debtor or his assignee. (*Sexey vs. Adkison*, 40 Cal. 408.) See also *Secs. 365, 368-9 ante*.

§ 383. **Death of Defendant after Levy.**—The death of the judgment debtor after levy of execution does not affect the lien or relieve the sheriff of his obligation to sell the property. (*Vermont Marble Co. vs. Superior Court*, 99 Cal. 579.)

§ 384. **Computation of Interest on Judgment.**—The statutory interest on the judgment is to be computed from the date of its entry, and not from the date of the rendition or signing.

§ 385. **Return of Writ.**—An execution should not be returned until the return day indicated in the writ, except upon written instructions from the plaintiff or plaintiff's attorney. An officer's return on process of every kind should state that he has performed what the mandatory part of the process requires of him. It should be a report of his proceedings, and should contain a statement of the acts which he has done under and by virtue of it, and the place and the time when and where they were done. The office is merely ministerial. Hence it is insufficient for him to return that he has duly or legally served the process committed to him. The time for its return does not therefore commence to run until it has been indorsed "re-

ceived." In California the execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. (*Sec. 683 Code Civil Procedure.*) Compare :

Arizona. Statutes 1889, p. 38, Sec. 3.

Colorado. Sec. 2538 Mill's Ann. Statutes, 1891.

Idaho. Sec. 4472 Revised Statutes, 1887.

Montana. Sec. 315 Code Civil Procedure.

Nevada. Sec. 3236 General Statutes, 1885.

Oregon. Sec. 278 I Hill's Codes, 1892.

Washington. Sec. 507 II Hill's Codes, 1891.

Utah. Sec. 562 Code Civil Procedure.

§ 386. **Necessity of Prompt Return.**—The sheriff is liable on his bond if he fails to return an order of sale, whereby the plaintiff loses his debt by reason of failure to procure entry of a deficiency judgment. See also *Sec. 387, post.*

§ 387. **Proper Filing of Return.**—Care should be taken by the sheriff to see that his return is properly filed by the clerk; for if the judgment creditor loses his debt by not procuring deficiency judgment, no presumptions are indulged in favor of the sheriff, if the return be subsequently found in the clerk's office without indorsement of filing. (*Boyd vs. Desmond, 79 Cal. 250.*)

§ 388. **Return—Time Suspended by Injunction.**—An order made by a court of competent jurisdiction, staying the sheriff from interference with the property of a judgment debtor, suspends, during its continuance, the running of the statutory period for

executing the process. (*Ansonia Brass and Copper Co. vs. Connor*, 103 N. Y. 502.)

§ 389. **Stay of Proceedings Extends Time.**
When a stay of proceedings is ordered, the time of the stay is not to be computed as part of the time in which the writ runs to the return day. That is, if a writ is made returnable within sixty days, and a stay of proceedings is granted for twenty days, the writ will have eighty days to run before it must be returned.

§ 390. **Return in Foreclosure Cases.**—An order of sale in foreclosure, either by certified copy of the decree or by writ issued by the clerk of the court, is not an execution within the meaning of a provision requiring the return of execution within a certain period; and if the writ contain such a direction, it is of no effect and a sale made after the time mentioned is valid. (*Southern Cal. L. Co. vs. Hotel Co.*, 94 Cal. 217.)

§ 391. **Effect of Insolvency Proceedings.**—By the California Insolvent Act of 1880, any valid lien, either of a judgment or by levy of execution upon property of the insolvent debtor, existing in good faith under proceedings already commenced, is not affected. (Sec. 45.) If any suit be pending, it may be prosecuted to judgment by leave of court, for the ascertainment of the amount due or for fixing the liability of sureties on bond given to release attachment; in either case execution shall be stayed to await the determination of the court in insolvency on the question of discharge. (Sec. 45.) When levy of execution has been made at the time the petition in insolvency is filed, the sheriff

should proceed with the sale, the statutory restraining order in the insolvency proceedings being of no effect as against the lien of the judgment creditor. (*Vermont Marble Co. vs. Superior Court*, 99 Cal. 579.)

§ 392. **Foreclosure of Mortgages and Other Liens.**—In California a valid mortgage or mechanic's lien existing upon property of the insolvent debtor at the time of filing the petition, may be foreclosed by leave of the insolvency court, and the property may be sold on execution sale, the mortgagee, however, being required to waive all claim upon the other assets of the insolvent debtor. (*Sec. 44 Insolvent Act of 1880; Montgomery vs. Merrill*, 62 Cal. 385; *Bradford vs. Dorsey*, 63 Cal. 122.)

§ 393. **Execution against Corporations for Fine.**—"When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action." (*California. Sec. 1397 Penal Code.*

§ 394. **Justice's Court Executions.**—In California execution for the enforcement of a judgment of a Justice's Court may be issued at any time within five years from the entry of judgment. It must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice, and bear date the day of its delivery to the officer. At the request of the judgment creditor, the writ may be renewed before the expiration of time fixed for its return, by the word "renewed" written thereon, with the date thereof, and

subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. (*California. Secs. 901-3 Code Civil Procedure.*)

The filing and docketing of a transcript of a judgment rendered by a justice of the peace in the office of the clerk of the county does not empower the clerk of the court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition. (*Kerns vs. Graves, 26 Cal. 156.*)

With reference to property in the same county, the provisions for the enforcement of an execution upon a judgment in a Justice's Court are the same as those relating to courts of record.

§ 395. **Power of Justice over His Judgments.**

—A justice of the peace has power to recall an execution issued by him on a void judgment, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and the execution has been issued by the clerk. (*Gates vs. Lane, 49 Cal. 266.*)

§ 396. **Enjoining Justice's Judgment.**—If a judgment rendered by a justice of the peace is void on its face, a suit in equity cannot be maintained to restrain its enforcement by execution, even if the execution is issued by the county clerk on a copy of the judgment docketed with him. (*Gates vs. Lane, 49 Cal. 266.*)

§ 397. **Execution to Constable—Levy by Sheriff.**—The fact that an execution issued to a con-

stable was served by the sheriff does not render the service void where it might have been issued to either the sheriff or constable. (*Ross vs. Wellman*, 36 Pac. Rep. 402, 102 Cal. 1.)

§ 398. **Setting Aside Justice's Court Execution.**—Where plaintiff seeks to enjoin a sale of personal property, under an execution issued upon a judgment recovered against him in a Justice's Court, on the ground that the summons was never served on him, and therefore that the justice never acquired jurisdiction of his person: *Held*, that plaintiff's remedy is by motion in the Justice's Court to set aside the execution. (*Comstock vs. Clemens*, 19 Cal. 77.)

CHAPTER XIII.

EXECUTION—PERSONAL PROPERTY.

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§ 399. **Levy, How Made.**—The manner of making the levy of the writ of execution is the same as upon levy of attachment. The California Code of Civil Procedure (*Sec. 688*) provides that “shares and interest in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.” In Colorado execution binds the personal property of the defendant as soon as the writ comes to the sheriff’s hands. (As to manner of levying attachment, see Chapters X and XI, *ante*.)

Arizona. Sec. 55 Revised Statutes, 1889.

Colorado. Sec. 2538 Mill’s Ann. Statutes, 1891.

Idaho. Sec. 4477 Revised Statutes, 1887.

Montana. Sec. 319 Code Civil Procedure.

Nevada. Sec. 3241 General Statutes, 1885.

Oregon. Sec. 283 I Hill’s Codes, 1892.

Utah. Sec. 309 Code Civil Procedure.

Washington. Sec. 296 II Hill’s Codes, 1891.

§ 400. **Arizona—Levy, How Made.**—In Arizona a levy of execution on personal property is made “by taking possession thereof, when the defendant in execution is entitled to the possession. When the defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them, where there are several.

“A levy upon horses, mules, jacks, jennets, horned cattle or hogs running at large in a range, and which cannot be herded or penned without great inconvenience and expense, may be made by designating, by reasonable estimate, the number of animals and describing them by their marks and brands, or either. Such levy shall be made in the presence of two or more credible persons, and notice thereof shall be given in writing to the owner or his herder or agent, if residing within the county and known to the officer making the levy, and a copy of such notice attached to a copy of the writ shall be filed by the officer with the county recorder of the county where the levy is made.

“A levy on the stock of any corporation or joint stock company may be made by leaving a notice thereof with the secretary or other officer of the company upon whom service of process against the company is authorized by law.

“A levy upon the interest of a partner in partnership property is made by leaving notice with one or more of the partners or with a clerk of the partnership.” (*Laws of 1889, pp. 39, 40, Sec. 9.*)

§ 401. **Forthcoming Bond.**—In Colorado, Oregon and Washington, after levy of execution, the

debtor may be allowed to retain possession of the property upon giving to the sheriff a bond, with sufficient surety, conditioned that the property shall be delivered to the sheriff at the time and place of sale, and for non-delivery an action may be maintained on such bond.

Colorado. Secs. 2559-60 Mills' Ann. Stats., 1891.

Oregon. Sec. 290 I Hill's Codes, 1892.

Washington. Sec. 499 II Hill's Codes, 1891.

§ 402. **Entry into Buildings.**—An execution will not justify breaking into a house. But after entrance has been lawfully effected, through an outside door, the officer may, for the purpose of levying upon property, break through inside doors to get at the property.

§ 403. **Expense of Keeping Property Levied Upon.**—The sheriff is allowed his necessary expenses in keeping and preserving property seized on attachment or executions, the amount to be fixed by the court and paid out of the fees collected in the action. (*California. Statutes 1893, p. 507.*)

§ 404. **Inventory of Property.**—A special inventory of the articles to be sold should be prepared, so that confusion may be avoided when the sale takes place. A large stock of goods sold in parcels cannot well be disposed of at a public sale where there are many bidders present without such an inventory and prearranged method of conducting the sale. (See also *Sec. 262, ante.*)

§ 405. **Notice of Sale.**—No sale should be held except after the statutory notice has been given, which in California is by posting written (or printed) notice

of the time and place of sale in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days. The notices must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. If the writ does not specify in the judgment the kind of money, the sale should be made for "lawful money of the United States."

Arizona. *Secs. 1901, 1906-9 Revised Statutes, 1887.*

Colorado. *Secs. 2558, 2545 Mills' Ann. Stat., p. 891.*

Idaho. *Sec. 4482 Revised Statutes, 1887.*

Montana. *Sec. 332 Code Civil Procedure.*

Nevada. *Sec. 3245 General Statutes, 1885.*

Oregon. *Sec. 291 I Hill's Codes, 1892.*

Utah. *Sec. 572 Code Civil Procedure.*

Washington. *Secs. 500-1 II Hill's Codes, 1891.*

§ 406. **Levy upon Judgments.**—The method of levying upon a judgment is so clearly and authoritatively pointed out in the decision of the Supreme Court of the State of California, in the case of *McBride vs. Fallon* (65 Cal. 301), that the portion of that decision relating thereto is herewith quoted.

Two cross judgments existed between the parties. One party took out an execution on the judgment in his favor, and caused it to be levied on the judgment against him, which was subsequently sold for a nominal sum. The plaintiff in whose favor the judgment so levied upon and sold was entered, moved the court, after said sale, that execution issue thereon. The motion was granted, and from that order the appeal was taken. In deciding the case, the Supreme Court say: "We

are clearly of opinion that a judgment cannot, in any case, be levied on and sold under execution as the judgment in this case was. After enumerating the kinds of property of a judgment debtor liable to execution, the code provides that 'shares and interests in any corporation or company and *debts* and *credits* . . . and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment.' (C. C. P. 688.)

"'Debts and credits, and property not capable of manual delivery, must be attached' in the mode pointed out in Subdivision 5, Section 542, Code Civil Procedure, that is, 'by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.'

"The fact that a debt is evidenced by a judgment does not, in our opinion, make it anything more or less than a debt, or more capable of manual delivery than it would be if not so evidenced. No provision is made for attaching or levying on *evidences* of debt. It is the debt itself which may be attached by writ of attachment, or 'on execution in like manner as upon writs of attachment.' This we think to be the meaning of the code, and the mode prescribed by it is exclusive. (*Code Civil Procedure, 4 and 18.*)"

In the later case of *Dore vs. Dougherty* (72 Cal. 232) the court say: "It is claimed that the judgment was not subject to levy and sale under execution. We think this point well taken. It was expressly so held in *McBride*

vs. Fallon, 65 Cal. 301. . . . It is claimed that the case of *McBride vs. Fallon*, *supra*, only holds that the sale could not be made as it was attempted in that case, and that the mode of levy there was different from the mode pursued here. But that ruling is expressly placed on the ground that the judgment is but the evidence of the debt, and that the statute has made no provision for attaching or levying upon evidences of debt, but that it is the debt itself, and not the evidence of it, which may be levied upon by the writ of attachment, or on execution in like manner as upon writs of attachment." These cases have also been cited with approval in the more recent case of *Latham vs. Blake*, 77 Cal. 646.

§ 407. **Indebtedness Evidenced by Promissory Note.**—In *Davis vs. Mitchell*, 34 Cal. 81, it was held that a sheriff might, under an execution and sale, levy on a promissory note belonging to the judgment debtor, and that the purchaser took it subject to any defense which the maker might have had against it, if the payee had retained it. Whether, in such case, the sale will be valid without a delivery of the note to the purchaser, is discussed in the decision, but not decided.

In the more recent case of *McBride vs. Fallon*, 65 Cal. 301 (see also Sec. 406, *ante*) the court, commenting upon that case, said: "In that case the sheriff had possession of the note, and delivered it to the purchaser. The court alluded to that circumstance, without passing upon its materiality. The case arose and was decided before the enactment of the code, which, while it does not prescribe a mode of proceeding in such cases materially different from that pointed out by the late Practice Act, makes that mode exclusive. But, independ-

ently of that circumstance, we could not, with our present views, assent to the doctrine of that case." The code provisions referred to will be found in Sections 232 and 399, *ante*.

§ 408. **Certain Corporation Stock Not Subject to Execution.**—Stock of a corporation, purchased by it at a sale for delinquent assessments under statutory provisions, cannot be levied on under an execution against the corporation. (*Robinson vs. Spaulding G. & S. Mfg. Co.*, 72 Cal. 32.)

§ 409. **Property Held As Security Not Subject to Execution.**—A, being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterward levied upon by the defendants under an execution in their favor, against A, as his property: *Held*, that the lumber was not subject to seizure under an execution against A, without payment, in the first place, of his indebtedness to B. (*Swanston & Taylor vs. Sublette*, 1 Cal. 124.)

§ 410. **Property of Inhabitants Not Liable for County Debts.**—The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. (*Emeric vs. Gilman*, 10 Cal. 404.)

§ 411. **Property in Custody of Law.**—Property in the custody of the law is not liable to seizure, without an order from the court having charge thereof. (*Yuba County vs. Adams*, 7 Cal. 35.) See also *Sec. 217a, ante*.

§ 412. **Equitable Claim Not Subject to Execution.**—The equitable claim of a vendee for return of part payments made by him on a purchase of land, as to which he is in default, is not subject to garnishment by his judgment creditor. (*Redondo Beach Co. vs. Brewer*, 101 Cal. 322.)

§ 413. **Sale of Choses in Action.**—Wherever choses in action are liable to levy and sale, they must be in possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest (where it is a contingent and complicated contract) and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. In the case of *Crandall vs. Blen*, 13 Cal. 20, the sheriff levied by garnishment upon a written contract or agreement, but did not take any property into possession. Notices were posted and sale had and the agreement was struck off to the plaintiff. The agreement was not present at the sale, nor fully explained to the bystanders. The court held that no title whatever passed by the sale.

§ 414. **Sale of Toll Road.**—A franchise may be treated as property and sold under execution. Section 388 of the California Civil Code provides that "for the satisfaction of any judgment against a corporation, authorized to receive tolls, its franchise and all the rights and privileges thereof may be levied upon and sold under execution, in the same manner and with like effect as any other property." The sheriff is required to give to the purchaser at such sale a certificate of purchase.

Such sale must be made in the county in which the corporation has its principal place of business, or in which the property or some portion thereof, upon which the taxes are paid, is situated. (*Secs. 389, 393 Civil Code.*)

Colorado. Secs. 2541-4 Mills' Ann. Stats., 1891.

§ 415. **Property of Wife Not Liable for Husband's Debt.**—The property of the wife cannot be taken under an execution against her husband. Section 8 of Article XX of the Constitution of California provides that all property, real and personal, owned by either husband or wife before marriage, or that acquired by either of them afterwards, by gift, devise or descent, shall be their separate property; and Section 168 of the Civil Code declares that the earnings of the wife are not liable for the debts of the husband.

§ 416. **Gift from Husband to Wife.**—A transfer of personal property by gift from the husband to the wife creates separate property in the wife, and is valid as to all, except existing creditors and *bona-fide* subsequent purchasers without notice. Such a transfer cannot be attacked as fraudulent and void as to subsequent creditors in an action for the recovery of the property by the wife against an officer who has seized it under execution, unless he proves not only the issuing of the execution, the levy, and that he was a creditor, but also the rendition of a judgment upon his debt, and that the execution was issued upon the judgment.

In the case of *Kane vs. Desmond*, 63 Cal. 464, "the defendant seized the piano in controversy from the possession of plaintiff, by an execution issued in favor of

A. L. Day *vs.* Thomas Kane, and sold it at execution sale as the property of Kane to satisfy the execution. Thomas Kane was the husband of plaintiff. On the trial of the case, the court found that the plaintiff was, at the time of the seizure and sale, the sole and exclusive owner of the property, in her own right, and entitled to its possession, and that her husband had no right or title to it." In deciding the case, the Supreme Court say:—

"The seizure of the property was therefore wrongful (*Wellman vs. English*, 38 Cal. 583; *Lewis vs. Johns*, 34 Id. 629; *Van Pelt vs. Little*, 14 Id. 194), and the plaintiff was entitled to recover. But the finding is attacked as against the law and the evidence in this, that the evidence showed the plaintiff's claim of title to the property was founded on a gift from her husband, which was void as to his creditors. But it does not appear that the husband was indebted to anyone at the time of the gift, except to the person from whom he had rented the piano under an agreement to purchase it on the installment plan. Being free from debt, the husband had the right to transfer his interest in the property to his wife by gift, and the wife, under the law, had the capacity to take and hold it in her own name and right. (*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629; *Woods vs. Whitney*, 42 Id. 358; *Higgings vs. Higgings*, 46 Id. 259; *Peck vs. Brummagin*, 31 Id. 440.) The gift was complete, for the evidence tended to show that immediately after the husband had rented the piano under the agreement to purchase, he delivered it to his wife as a gift, and she accepted it, and used it continuously as her separate property until the time of the seizure. Now, this transfer by gift was valid and effectual between herself and her hus-

band and all the world, except existing creditors and *bona-fide* subsequent purchasers without notice. There was no proof that Day—the execution creditor—was a creditor of the husband at the time of the gift, and there is no presumption that the gift was void as to him as a subsequent creditor. (*Wells vs. Stout*, 9 Cal. 479; *Hussey vs. Castle*, 41 Id. 239.)”

§ 417. **Garnishment and Demand.**—The method of serving a garnishment on execution upon debts, credits and personal property, in the hands of a third party, is the same as in levying a writ of attachment upon similar property, and is explained elsewhere under the head of “Attachments.” (*Secs. 263-4, 399, ante.*) Therefore, when a garnishment is served under an execution, a demand should be made upon the person served for the delivery to the sheriff of any money or other property belonging or owing to the defendant, in the possession or under the control of the person served.

§ 418. **Remedy on Garnishee's Failure to Deliver.**—Under the California Code provisions, the garnishee may be examined under oath on proceedings supplementary to execution and compelled to apply to the satisfaction of the judgment any property of the judgment debtor in his hands, not exempt from execution. If the garnishee denies the debt or claims the property adversely to the debtor, the court may authorize the judgment creditor to institute an action for the recovery of the debt or property. (*Secs. 717-720 Code Civil Procedure.*)

In the case of *Staples vs. May*, 87 Cal. 178, it was held that a liability of the garnishee to the judgment

debtor, although sounding wholly in tort, was the subject of garnishment, and could be reached under proceedings supplementary to execution. And in a more recent case it was held that under the California practice, if the garnishee on execution fails to pay over to the officer the money in his hands, the proper remedy of the judgment creditor is by proceedings supplementary to execution. He has no cause of action in assumpsit, nor can he maintain a creditor's bill in equity to reach the indebtedness without first exhausting his remedy by examination of the judgment debtor under the sections above cited. (*Herrlich vs. Kauffman*, 99 Cal. 271.)

Further reference to the scope of supplementary proceedings for the enforcement of garnishments will be found in a later portion of this chapter. (*Secs. 420-1, post.*)

§ 419. **Prior Assignment of Fund Garnisheed.**

—A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. (*Walling vs. Miller*, 15 Cal. 39.)

Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and one Coulter were two. While the dust was in the hands of defendants, Coulter sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of Coulter attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the

attachment, when plaintiff demanded Coulter's share of the coin: *Held*, that plaintiff was entitled to the coin; that the dust in defendant's hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of purchaser or assignee; and after such order, neither C. nor his creditors could claim any right to the money. (*Walling vs. Miller*, 15 Cal. 39.)

§ 420. **Supplementary Proceedings.**—In California statutory provision is made for the examination of the judgment debtor or anyone indebted to him, when an execution is returned unsatisfied or when the debtor has property which he unjustly refuses to apply toward satisfaction of the debt. If there be danger of his absconding, he may be required to give bonds to secure his attendance for examination, and, in default of such bonds, he may be committed to prison. Witnesses may be required to appear and testify at the examination, and "the judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. . . . If it appear that a person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation, for the recovery of such interest or debt; and the court or

judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just." Disobedience of any proper order made in such proceeding may be punished as a contempt. (*California. Secs. 714-721 Code Civil Procedure.*)

A justice of the peace may adjudge a party guilty of contempt, who, on proceedings supplementary to execution, refuses to obey an order directing him to deliver to an officer property which he has, liable to execution, and may direct him to be imprisoned until he complies with the order. In such cases the jurisdiction of the justice is not limited to a fine of \$100 and one day's imprisonment, as provided in Sec. 909 Code Civil Procedure, for Sec. 1219 Code Civil Procedure applies to Justice's Courts, and authorizes imprisonment, in certain cases, until the order is complied with. (*Ex parte Latimer, 47 Cal. 131.*)

§ 421. **Supplementary Proceedings—Scope of.** - In California the statutory proceedings supplementary to execution are intended to take the place of the former creditor's bill. (*Herrlich vs. Kauffman, 99 Cal. 271; Freeman on Executions, Sec. 394.*)

Payment of a debt, secured by mortgage, and attached by garnishment, may be enforced by proceedings supplementary to execution. (*McGarren vs. Garrity, 68 Cal. 566.*)

A patent right is not subject to execution and forced sale; but, upon proceedings supplementary to execution, the debtor may be ordered to assign his patent right to

a receiver, who may sell the same to satisfy the judgment. (*Pacific Bank vs. Robinson*, 57 Cal. 520; *Habenicht vs. Lissak*, 78 Cal. 351.)

If, on supplementary proceedings, a garnishee be found to be indebted to the judgment debtor, the court may make an order that he pay to the plaintiff the amount of such indebtedness, and such order is, in effect, a judgment on which execution may issue. Suit may also be brought upon the same by the judgment creditor against the garnishee. (*Bronzan vs. Drobaz*, 93 Cal. 647.)

§ 422. **Personal Privilege or Right, How Sold.**

—A mere personal privilege, license or right, such as a patent or a seat in a stock and exchange board, is not property which may be sold upon execution. Upon proceedings supplementary to execution, however, the debtor may be ordered to assign it to a receiver, named and appointed in the order, and empowered to sell the same to satisfy the judgment. (*Habenicht vs. Lissak*, 78 Cal. 351; *Pacific Bank vs. Robinson*, 57 Cal. 520; *Lowenberg vs. Greenebaum*, 99 Cal. 162.) The following cases also hold a seat in a stock and exchange board to be property, subject to sale under execution proceedings. (*Hyde vs. Wood*, 94 U. S. 523; *Powell vs. Waldron*, 89 N. Y. 328; *In re Ketchum*, 1 Fed. Rep. 840, N. Y.; *In re Werder*, 15 Fed. Rep. 789, N. J.); while, on the contrary, such a seat has been held to be a mere personal privilege incapable of forced sale in 93 Pa. St. 55, 66; 122 Am. Law Reg. 435 (Ill.) and 6 Bissell 526 (Ill.).

§ 423. **Franchise Not Liable to Execution Sale.**—A franchise is not property capable of manual

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delivery, and cannot be levied upon and sold under execution unless there be a statutory provision expressly authorizing the sale; and when such provision exists, the extent as well as the mode of levy and sale are limited thereby. A statute authorizing execution sale of the franchise of a corporation does not authorize the sale of a franchise owned by a private individual. A provision in a judgment requiring the defendant to deliver possession of a franchise is not susceptible of execution. (*Gregory vs. Blanchard*, 98 Cal. 311.)

§ 424. **Personal Property Mortgaged, Pledged, etc.**—When an officer is directed to levy execution upon personal property which, under the California Code provision (*Sec. 2955 Civil Code*), may be subject to mortgage of record without change of possession, he should endeavor to ascertain if it has been mortgaged, as, in such case, it cannot be taken without payment or tender of the amount of the mortgage debt. (*California. Secs. 2968-70 Civil Code.*) The same rules apply to levy of execution upon personal property mortgaged, pledged or held for liens, as in case of levy of attachment, which subject is treated in a preceding chapter. (*Secs. 304-310, 315-321, ante.*)

§ 425. **Proceeds of Mortgaged Property.**—When personal property mortgaged is sold at foreclosure sale, the officer must apply the proceeds of the sale as follows: (1st) To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and (2d) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases. (*California. Sec. 2970 Civil Code.*)

§ 426. **Execution Sales of Vessels.**—"When an attachment has been levied upon a steamer, vessel or boat, and the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:—

"1. When the action is brought for demands other than the wages of mariners, boatmen and others employed in the service of the steamer, vessel or boat sold, to the payment of the amount of such wages as specified in the execution.

"2. To the payment of the judgment and costs, including his fees.

"3. He must pay any balance remaining to the owner, or the master, agent or consignee, who may have appeared on behalf of the owner, or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto." (*California. Sec. 824 Code Civil Procedure.*)

The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel or boat, and a general description of her condition. (*California. Sec. 827 Code Civil Procedure.*) Compare:

Montana. Secs. 218-9 Revised Statutes, 1887.

§ 427. **Preferred Claims against Vessels.**—The only preference given over the judgment creditor, in execution sales of vessels, is in the case of claims for wages of mariners, boatmen and others employed

in the service of the vessel, which must be first paid, provided verified claims be filed as provided in Secs. 825-6 C. C. P. (See *Fisher vs. White*, 8 Cal. 418.)

§ 428. **Purchaser Entitled to Certificate of Sale.**—When the purchaser of any personal property, capable of manual delivery, pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. If the sale is of personal property not capable of manual delivery, the officer, on receipt of the purchase money, must execute and deliver to the purchaser a certificate of sale, and such certificate conveys all the right which the debtor had in such property on the day the execution or attachment was levied. (*California. Secs. 698-9 C. C. P.*)

A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate. (*Lay vs. Neville*, 25 Cal. 546.)

Arizona. Statutes 1889, p. 42, Sec. 18.

Colorado. Sec. 102 Civil Code, Acts 1887, p. 126.

Nevada. Secs. 3251-2 General Statutes, 1885.

Oregon. Sec. 294 I Hill's Codes, 1892.

Washington. Sec. 503 II Hill's Codes, 1891.

§ 429. **Claim by Third Party.**—The practice varies in the different states and territories in case property held under execution is claimed by third parties. In California if the property be claimed by a written claim, verified by the oath of the claimant, setting out his title and right to possession and stating

the grounds of the title, the sheriff is not bound to keep the property unless the person in whose favor the execution runs, on demand, indemnify the sheriff against such claim "by an undertaking by at least two good and sufficient sureties." In Idaho the sheriff is to call a jury of six persons, and their verdict in favor of the claimant justifies the officer in releasing the property. In Montana and Nevada if the property be claimed under oath, the sheriff must deliver it to the claimant, unless the plaintiff gives a good and sufficient indemnity bond. In Oregon a jury of six persons is to be called by the sheriff, and, if their verdict be in favor of the claimant, the officer may still proceed with the sale if the plaintiff give him a sufficient indemnity bond. In Utah, upon the verdict of a sheriff's jury of six persons in favor of the claimant, he may relinquish the levy unless a sufficient indemnity bond be given. In Arizona and Washington, upon the filing of the verified claim and a sufficient bond by the claimant, the property must be delivered to him, and a court trial is had as to the right of property.

Arizona. *Laws of 1889, p. 40, Sec. 10; Secs. 3166-70 Revised Statutes, 1887.*

California. *Sec. 689 Code Civil Procedure.*

Idaho. *Sec. 4478 Revised Statutes, 1887.*

Montana. *Sec. 320 Code Civil Procedure.*

Nevada. *Sec. 220 Code Civil Procedure.*

Oregon. *Sec. 156 I Hill's Codes, 1892.*

Utah. *Sec. 568 Code Civil Procedure.*

Washington. *Secs. 491-5 II Hill's Codes, 1891.*

§ 430. **Liability for Wrongful Sale.**—An officer is liable to the owner of personal property for the seizure and sale thereof under an execution against a third

party, and he is not relieved from liability by professing to sell only the "right, title and interest" of the defendant.

§ 431. **Levy on Partnership or Joint Property.**—The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff on an execution against one of the partners: and, in order to effect a sale, he may take possession of the entire property upon levy of either execution or attachment. He can only levy upon and sell the interest and right therein of the partner sued, subject to the prior rights and liens of the other partners and the joint creditors therein. And the same is equally true in case of personal property owned by two or more persons in common. (*Weach vs. Adams*, 51 Cal. 609; *Clark vs. Cushing*, 52 Cal. 617; *Robinson vs. Tevis*, 38 Cal. 611; *Sheehy vs. Graves*, 58 Cal. 449; *Jones vs. Thompson*, 12 Cal. 199.) In the case last mentioned the court said:

"The interest of one partner in partnership property is such an estate under our statute as may be sold for his debts; it is a legal estate in chattels. It is true that as between the partners, the interest of each is only the residuum of the property left after the settlement of the firm debts; and that the rights of the firm creditors and the several partners are paramount to the claims of separate creditors of the firm. But this interest of the partner thus defined is held by the weight of authority subject to levy for his debts. Story on Part., Section 263, thus states the rule: 'In cases of this sort, therefore, the real position of the parties, relatively to each other, seems to be this: The partnership property may be taken in execution upon a separate judgment and execution against one partner; but

the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. By such seizure the sheriff acquires a special property in the goods seized; and the judgment creditor himself may, and the sheriff also, with the consent of the judgment creditor, file a bill against the other partners, for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained, but he may require the sheriff to proceed to a sale, which order the sheriff is bound by law to obey. In the event of a sale, the purchaser at the sale is substituted to the rights of the execution partner, *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest which he has acquired by the sale.'

In *Waldman vs. Broder*, 10 Cal. 378, certain personal property belonging to Waldman and one Franck had been seized by Broder, as sheriff, by virtue of an execution in his hands against the property of Franck; and Waldman, who was a co-tenant of Franck, having brought his action in replevin against the sheriff, the District Court instructed the jury to the effect that if Waldman and Franck were owners of the property as partners or joint owners of it in any other capacity, the plaintiff, Waldman, could not recover; and the jury having found a verdict for the defendant, it was held by the Supreme Court that the instruction was correct, the court observing that "if the defendant, as sheriff, levied on the property while it was the joint property of

plaintiff and Franck (against the latter of whom he had an execution), this is a justification. He had a right to levy on it, and take it into possession for the purpose of subjecting it to sale."

The case of *Waldman vs. Broder* was afterwards cited and approved, the language of Mr. Chief Justice Field, who delivered the opinion of the court, being as follows: "Vasquez and the plaintiffs were tenants in common of the grain, and in attaching the interest of one of them, the sheriff was justified in taking and detaining the possession of the entire quantity, though he will not be authorized to sell under the execution on the judgment which may be recovered in that action anything but the undivided one-third interest of Vasquez. The purchaser at the sale and the plaintiff will then be tenants in common of the property." (*Bernal vs. Hovious*, 17 Cal. 541.)

§ 432. **Priority of Partnership Creditors.**

It has been frequently decided by the courts that the creditors of a partnership are entitled to preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens. (*Chase vs. Steel*, 9 Cal. 64; *Conroy vs. Woods*, 13 Id. 626; *Dupuy vs. Leavenworth*, 17 Id. 262; *Burpee vs. Bunn*, 22 Id. 194; *Bullock vs. Hubbard*, 23 Id. 501; *Commercial Bank vs. Mitchell*, 58 Cal. 42.) And the same principle applies as between the creditors of several partnership firms.

In the case of *Bullock vs. Hubbard*, above cited, Bishop & Long were partners. Bishop & Long as a partnership was also a member of two other firms — Bishop, Long & Stewart, and Bishop, Long, Siefert

& Dodsworth. The firms all failed, and their property was attached by creditors. The creditors of Bishop, Long & Steuart, and Bishop, Long, Siefert & Dodsworth obtained the first attachments, and placed them in the hands of the sheriff, before the creditors of Bishop & Long placed theirs in his hands. The sheriff levied all the writs on the property in the order in which they were placed in his hands. The sheriff had in his hands a sum of money received from the sale of the property of Bishop & Long, to apply on the executions issued on judgments rendered in the actions. None of the others, as partnership firms, had any interest in this money. The sheriff commenced an action requiring the creditors to litigate their respective rights to the money. The court below held, and the Supreme Court affirmed the judgment, that the creditors of the firm of Bishop & Long were entitled to the money realized from the sale in the order of the priority of their several attachment liens.

In *Burpee vs. Bunn*, 22 Cal. 194, a separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee, to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. *Held*, that neither by his attachment nor by the agreement, did the separate creditor acquire any title to, or lien upon, the property, as against the superior equity of a subsequently attaching creditor of the partnership.

Where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale.

The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first. A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution. Partners may make a *bona-fide* sale of their property any time before their creditors acquire a lien; but such sale cannot include a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership in the vendee. The fact that an individual creditor obtains judgment, issues execution and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. In such cases of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property. (*Conroy vs. Woods*, 13 Cal. 626.)

In *Commercial Bank vs. Mitchell*, 58 Cal. 42, an action against the members of a partnership, upon a joint and several promissory note, signed by them individually, but not with the firm name, attachment was issued and levied upon the interests of defendants in the partnership property, upon which an attachment previously had been, and others were subsequently, levied in actions against the firm. Subsequently, the plaintiff amended his complaint by alleging the partnership of the defendants, and that the note was a partnership debt; but the action still ran against the defendants, as individuals, and judgment was entered against them in that capacity. Judgments having been entered in all the cases, the property was sold under execution in one

of the cases against the firm, and the proceeds applied in satisfaction of that execution and another in a similar case: *Held*, that the money was properly applied on the executions against the firm in preference to those of the plaintiff.

§ 433. **Harvested Grain Crop—Different Owners.**—Some of the questions relating to the duties of sheriffs in levying upon a harvested crop of grain, part of which is partnership property, and a part belonging to a stranger to the writ, and upon a portion of which there is a chattel mortgage, are plainly elucidated in the opinion of the court, in the case of *Sheehy vs. Graves* 58 Cal. 449. In that case Finch & Shinn were partners in a crop, and the latter mortgaged his interest and took possession of the whole crop. Afterwards, in an action by the plaintiff against Finch & Shinn, an attachment was levied upon the crop by the defendant as sheriff. In an action against the defendant for failure to make the money on an execution out of the property attached, the court found that it was agreed between the plaintiff, defendant and mortgagee that the latter should thresh and sack the grain, and that whatever should belong to the Shinn interest should be delivered to the defendant upon the plaintiff's attachment. The mortgagee threshed and sold the grain and paid to the defendant \$319 as the part belonging to Shinn, and this was applied on the execution, leaving a balance still due. Upon an appeal from a judgment for the defendant: *Held*, that, under the facts found, it was the duty of the sheriff to take possession of the Shinn interest after it was threshed and sacked, and to sell it in the manner required by law; and that he had no right to sell at private sale, or authorize another to do so; and

that, therefore, the decision was against law, and the judgment should be reversed upon the findings.

In deciding the case, the court say: "The case demands some other observations. If the crop raised on the Sheehy place was partnership property, what right had Jackson to take possession of it to the exclusion of Shinn, the partner from whom he had no mortgage? As against Jackson, who had a mortgage only of the interest of Finch, which interest could only be determined after a settlement of the accounts of the partnership, where it might have turned out that Shinn was entitled to the whole (*Civil Code, Sec. 2405*), Shinn had a right to the possession, and under these circumstances it was the duty of the sheriff, having in his hands the execution against both the partners, to take possession of all the grain on the Sheehy place. Shinn could not be deprived of the possession of the whole by the assignment by his partner of his interest. The sheriff neglected his duty and was guilty of a breach of his bond as set forth in the complaint, in not taking possession of the whole grain, at least on the Sheehy place, as he was ordered to do."

§ 434. **Partnership—Sale or Dissolution.**—

Where one partner *bona fide* sold the partnership property to satisfy his individual indebtedness, and in an action of replevin by the purchaser against a creditor of the firm who has attached the property, after the sale and delivery, as the firm property, and for a firm debt, the court properly rendered a judgment for the purchaser; and it will be presumed in support of the judgment that the court below found it as a fact that the other partner consented to and authorized the sale. So long as the legal title of the partnership property

remains in the co-partners, a creditor of the firm may pursue his remedy against it, in an action at law, in the same manner as against an individual debtor. But if the legal title has been conveyed to a third person *bona fide*, the creditor can pursue the property only by a bill in equity to marshal the assets and enforce his equitable lien. (*Stokes vs. Stevens*, 40 Cal. 391.)

The filing of a bill by one partner against his co-partners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to levy at any time before a final decree of dissolution and distribution. (*Adams vs. Woods*, 9 Cal. 24.)

§ 435. **Release of Execution.**—Upon order of the plaintiff's attorney, or upon payment to the officer of the amount due on the execution, including costs accrued, the sheriff should release the property.

When property has been seized upon execution and an appeal has been taken and the stay bond filed, which by statute "stays all further proceedings and releases property levied upon," the sheriff should release at once without waiting for justification of sureties or waiver of the same. (*Sam Yuen vs. McMann*, 99 Cal. 497.)

If, after an execution has been levied on sufficient property to satisfy the judgment, the court orders that the judgment be not enforced, the order releases the levy, and it will not have the effect of satisfying the judgment. (*Mulford vs. Estudillo*, 22 Cal. 132.)

CHAPTER XIV.

EXECUTIONS—REAL PROPERTY.

- § 436. Levy upon Real Property.
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- § 438. Equity of Redemption Subject to Sale.
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§ 436. **Levy upon Real Property.**—In levying upon real property, the same method is followed as under the writ of attachment. Section 688 of the California Code of Civil Procedure provides that "all property, both real and personal, or any interest in either real or personal property, may be attached on execution in like manner as upon writs of attachment" (see Chapter XI, *ante*), and similar provisions prevail in other states. In Colorado the execution becomes a lien upon all property of the defendant from the time of delivery of the writ to the sheriff. (*11 Colo. 418.*) Compare:

Arizona. *Laws of 1889, pp. 39, 40, Secs. 8, 12.*

Idaho. *Sec. 4477 Revised Statutes, 1887.*

Colorado. *Secs. 2529, 2545 Mills' Ann. Stat., 1891.*

Montana. *Sec. 319 Code Civil Procedure.*

Nevada. *Sec. 219 Code Civil Procedure.*

Oregon. *Sec. 283 I Hill's Codes, 1892.*

Utah. *Sec. 567 Code Civil Procedure.*

Washington. *Secs. 479, 496 II Hill's Codes, 1891.*

§ 437. **Real Property—Interests Subject to Sale.**—As the term “real property” is coextensive with lands, tenements and hereditaments (*Cal. Civil Code, Sec. 14, Sub. 5*), and the term “land” embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—executory as well as executed—any interest whatever in land, legal or equitable, is subject to attachment or execution levy and sale. (*Fish vs. Fowler, 58 Cal. 373.*)

The interest of a person who holds a contract to purchase land may therefore be levied upon and sold. The officer levies upon the interest of the debtor in the property. If it turn out that the debtor had no interest therein, no property is acquired thereby. The notice of levy, notice of sale, the certificate of sale given to the purchaser, and the deed which follows after the expiration of the time for redemption, should recite that it is the interest of the debtor which is affected by the several proceedings. (See also *Sec. 466, post.*)

§ 438. **Equity of Redemption Subject to Sale.**—The interest of a judgment debtor whose land has been sold at execution sale, the time for redemption not having expired may be subjected to execution sale. (*McMillan vs. Richards, 9 Cal. 365.*)

§ 439. **Interest of Purchaser at Judicial Sale Subject to Sale.**—“After the expiration of the time of redemption, and before execution of the sheriff’s deed, the purchaser has an estate which is subject to be seized and sold. Upon the same principle, we can perceive no good reason why the interest of the purchaser may not also be seized and sold before the expiration of the time for redemption.” (*Page vs. Rogers, 31 Cal. 305.*)

§ 440. **Interest of Grantor after Trust Deed Made.**—If a deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on an execution against him. (*Kennedy vs. Nunan*, 52 Cal. 326.)

§ 441. **Mining Claim Liable to Execution.**—The interest of a miner in his mining claim is property, and may be taken and sold under execution. (*McKee vs. Bisbee*, 9 Cal. 137.)

§ 442. **When Owner Is Estopped from Asserting Title.**—It is a well-settled rule of all courts of equity that the owner of land who stands by and sees another sell it, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. In strict analogy to this rule it is also a familiar principle that one who knowingly and silently permits another to expend money on land, under a mistaken impression that he has title, will not be permitted to set up his right. (*Godeffroy vs. Caldwell*, 2 Cal. 492.) See also *Sec. 289, ante*.

§ 443. **Levy upon Larger Tract Including Debtor's Land.**—When the judgment debtor has, or claims, an interest in only a small, well-defined parcel of a much larger tract of land, it is extremely irregular, to say the least, to levy the execution on his interest in the general tract instead of the particular parcel he claims. Upon an irregular levy of this character, and a threatened sale under it, the owner in possession of the larger tract might perhaps be entitled to enjoin the sale, except of the smaller parcel claimed by the judgment debtor. (*Logan vs. Hale*, 42 Cal. 645.)

§ 444. **Notice of Sale under Execution.**—Before the sale of real property under a writ of execution, under the California practice, notice thereof must be given as follows: By posting written notice of time and place of sale, “particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the notices of sale must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.” (*Sec. 692 Code Civil Procedure.*) Where no kind of money is specified, the sale should be made for “lawful money of the United States.” (See also *Sec. 437, ante.*)

Arizona. Laws of 1889, pp. 40, 41, Sec. 13.

Colorado. Sec. 2545 Mills' Ann. Stats., 1891.

Idaho. Sec. 4482 Revised Statutes, 1887.

Montana. Sec. 332 Code Civil Procedure.

Nevada. Sec. 3245 General Statutes, 1885.

Oregon. Sec. 291 I Hill's Codes, 1892.

Utah. Sec. 572 Code Civil Procedure.

Washington. Sec. 500 II Hill's Codes, 1891.

§ 445. **When and How Real Property Must Be Sold.**—Under Section 694 of the California Code of Civil Procedure “all sales of real property under execution, as in the case of personal property, must be made at auction to the highest bidder between the hours of nine and five, and after sufficient property has been sold to satisfy the writ in the officer's hands, no

more can be sold. When the property consists of several known lots or parcels, they must be sold separately; or when a portion of the property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the officer as to the order in which the various lots or parcels shall be sold, if they can be sold to advantage separately." Compare:

Arizona. Laws of 1889, p. 41, Sec. 15.

Colorado. Sec. 2545 Mills' Ann. Stats., 1891.

Idaho. Sec. 4484 Revised Statutes, 1887.

Montana. Sec. 334 Code Civil Procedure.

Nevada. Sec. 3247 General Statutes, 1885.

Oregon. Sec. 292 I Hill's Codes, 1892.

Utah. Sec. 577 Code Civil Procedure.

Washington. Sec. 501 II Hill's Codes, 1891.

§ 446. **Sale without Notice.**—Under the California practice, Sec. 692 Code of Civil Procedure prescribes the manner in which notice of sale must be given, and Sec. 693 provides that "an officer selling without the notice prescribed by the last section, forfeits \$500 to the aggrieved party, in addition to his actual damages." Similar provisions also exist in other states. (See also *Secs. 447–8 post.*)

Arizona. Sec. 1932 Revised Statutes, 1887.

Colorado. Sec. 2545 Mills' Ann. Statutes, 1891.

Nevada. Sec. 3246 General Statutes, 1885.

§ 447. **Purchaser Not an Aggrieved Party.**—The statutory provision relating to recovery of penalty for officer selling real property under execution without notice, does not apply to the purchaser at execution

sale without notice. Such purchaser is not the "aggrieved party" within the meaning of the section. The parties to the execution are the "aggrieved parties." (*Kelly vs. Desmond*, 63 Cal. 517.)

§ 448. **Recovery for Sale without Notice.**—When the statute fixes a penalty or forfeiture for making sale without notice, an action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. No right of property at an execution sale vests in the purchaser until he pays the purchase money, and until this is done, the sale is not so far perfected as to constitute the foundation of an action against the officer, to enforce a forfeiture for selling without the prescribed notice. (*Askew vs. Ebberts*, 22 Cal. 263.) See also *Sec. 447, ante*.

§ 449. **Sales under Two or More Executions.**—When an officer has two or more executions levied upon the same property, he may advertise the same for sale in one series of notices; and the notice should describe the judgments and titles of the different cases under which the levies were made.

§ 450. **Setting Aside Sheriff's Sale.**—A court of equity will not set aside a sheriff's sale and a deed executed under it, in a collateral action commenced for that purpose, by reason of irregularities in the conduct of the officer in making the levy and sale. (*Boles vs. Johnson*, 23 Cal. 226.)

§ 451. **Irregularities of Sale—Remedy.**—If parties have any remedy under such circumstances, it is by motion, properly made in the court where the judgment was rendered, to set aside the sale. *Id.*

§ 452. **Justice's Court Sale—Transcript.**—Real estate of a judgment debtor, situated in the county where the judgment before a justice of the peace was rendered, may be sold on execution upon the judgment, whether a transcript of the judgment be filed in the office of the recorder of such county or not. (*Campbell vs. Wickware*, 19 Cal. 145.) No filing of such transcript with the recorder is necessary, except as to property situated in a different county.

§ 453. **Sale to be Made in Parcels.**—Statutory provision is usually made that in case of sale of "real property, consisting of several known lots or parcels, they must be sold separately." (*California. Sec. 694 C. C. P.*) A sale not so conducted is not void, however, but merely voidable, and on timely motion the court should ordinarily set it aside, upon proper showing. While the rule, when laid down by statute, is controlling and should be strictly followed, it does not apply where each distinct parcel is first offered for sale separately, and no bids are received. In such case the property may then be offered and sold as a whole. (*Ontario Land and Improvement Co. vs. Bedford*, 90 Cal. 181; *Marston vs. White*, 91 Cal. 37.) See also *Secs. 454-7, post.*

§ 454. **Sale in Mass by Agreement.**—Frequently, at sheriff's sales, property consisting of separate parcels is sold in mass by agreement of the plain-

tiff and defendant in the execution, and where such sales are made, the defendant is estopped from complaining. It is not always a safe plan to pursue, however, as the judgment debtor in the execution may have other creditors who would be injured by such a course.

§ 455. **Debtor May Direct Order.**—Statutory provision is usually made to the effect that “the judgment debtor, if present at the sale, may direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately.” (*California. Sec. 694 Code Civil Procedure.*)

§ 456. **Setting Aside Sale—Showing Required.**—A sale of property under execution will not be set aside because sold *en masse*, unless it appears that a larger sum would have been realized if the property had been sold in parcels or that the sale of less than the whole tract would have brought sufficient to satisfy the writ. (*Hudepohl vs. Liberty Hill W. and Mg. Co.*, 94 Cal. 588.)

A sale in mass of real estate consisting of several known and distinct parcels, at a price greatly below the actual value of the property, cannot be sustained against the objection of the judgment debtor. Such sales are not absolutely void, but are voidable, and will be set aside upon reasonable and proper application, when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued. (*San Francisco vs. Pixley*, 21 Cal. 57.) In the case just cited, the sheriff sold a tract of land belonging to the corporation, one mile in length and half a mile in width,

which had, long previous to the sale, been laid out into blocks and streets, and marked upon the official map, and sold the same in mass, for \$360, while the actual value was \$75,000. The sale was set aside on account of the manner in which it had been made.

Where the land sold under execution consisted of separate but adjoining tracts, but the sheriff and purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels: *Held*, that the sale of the land, in gross, was valid. (*Smith vs. Randall*, 6 Cal. 57.) See also *Secs. 453, 454, ante; Sec. 457, post.*

§ 457. **Unreasonable Delay in Application.**

A sale of real property in mass will be set aside upon a proper application of the judgment debtor, when made in reasonable time after the sale. Such a sale, however, will not be set aside if the application is not made within a reasonable time. It was held in *Vigoureux vs. Murphy*, 54 Cal. 346, that where the application to avoid the sale was made more than three years after the sale by a cross-complaint to an action of ejectment brought by the successor of the purchaser—that the application came too late, though the sale should have been vacated had the application been made immediately on the return by the sheriff, and *perhaps* if it had been made within the time allowed for redemption.

§ 458. **Sheriff's Sales Not Credit Sales.**—A purchaser at a sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of the purchase money. A sheriff, by our laws, in selling property under execution, is not bound to receive any bid,

except for cash on the whole amount of the sale; and having received a bid with but a portion of the purchase money paid at the time, he may disregard the bid, and offer the property again for sale, if the balance of the purchase money is not paid before the return day of the execution. A sheriff is not bound to demand the purchase money before setting aside the bid, but the delay of the purchaser until the return day of the execution to pay the balance due, will be construed into a refusal on his part to pay the amount of his bid upon the property. (*People vs. Hays*, 5 Cal. 74.)

In an action against a purchaser at sheriff's sale, for not paying the amount of his bid, it cannot be set up in defense that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff. (*Harvey vs. Fisk*, 9 Cal. 94.)

§ 459. **Sale of Leasehold Interest—When Absolute.**—Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the sale is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption. Compare:

Arizona. *Laws of 1889*, p. 42, Sec. 19.

California. Secs. 700, 702 *Code Civil Procedure*.

Colorado. Sec. 2547 *Mills' Ann. Statutes*, 1891.

Idaho. Sec. 4490 *Revised Statutes*, 1887.

Montana. Sec. 340 *Code Civil Procedure*.

Nevada. Sec. 231 *Code Civil Procedure*.

Oregon. Sec. 299 *I Hill's Codes*, 1892.

Utah. Sec. 583 *Code Civil Procedure*.

Washington. Sec. 511 *II Hill's Codes*, 1891.

§ 460. **Certificate of Sale.**—Section 700 of the California Code of Civil Procedure provides that upon the sale of real property under execution, “the officer must give to the purchaser a certificate of sale, containing: (1) A particular description of the real property sold; (2) the price bid for each distinct lot or parcel; (3) the whole price paid; (4) when subject to redemption, it must be so stated. And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county.”

Arizona. Laws of 1889, p. 42, Sec. 19.

Colorado. Sec. 1850 General Statutes, 1883.

Idaho. Sec. 4490 Revised Statutes, 1887.

Montana. Sec. 340 Code Civil Procedure.

Nevada. Sec. 3253 General Statutes, 1885.

Oregon. Sec. 299 I Hill's Codes, 1892.

Utah. Sec. 583 Code Civil Procedure.

Washington. Sec. 511 II Hill's Codes, 1891.

§ 461. **Title under Sheriff's Certificate of Sale.**—The purchaser of real property at a sheriff's sale, who receives the sheriff's certificate of purchase, has not a title to the property, but a lien on the same. (*Baber vs. McClellan*, 30 Cal. 135.) The effect of such certificate is spent when the defendant in the judgment redeems.

§ 462. **Amendment of Certificate.**—A sheriff's certificate of sale, made to the wrong person, may be

amended, but it cannot affect a redemption already made by payment to the person named in the original certificate of record. (*Pekin Mining Co. vs. Kennedy*, 81 Cal. 356.)

§ 463. **Redemption.**—The procedure for redemption of real property is treated at length in the chapter on that subject. (*Secs. 533-542, post.*)

§ 464. **Resale on Refusal of Purchaser to Pay.**—If at the sale the purchaser refuses to pay the amount of the bid, the property may be offered for sale again at once, if there are other bidders present. But if the officer learns of the refusal to make the payment after the time fixed for the sale has passed, notices of resale should be posted, and the property re-advertised. (See also *Sec. 458, ante; Sec. 465, post.*)

§ 465. **Recovery from Bidder.**—If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. (*California. Sec. 695 Code Civil Procedure.*)

§ 466. **Sale Passes Interest Acquired after Levy.**—A sheriff, under an execution issued on a judgment which is not a lien, can only seize and sell such title and interest as the judgment debtor had in the land at the time of the levy, and such as he acquired between the time of the levy and the sale.

If, after the levy of an execution by the sheriff, on public land, and before the sale, the judgment debtor,

being preëmtioner, pays for the land levied on, and obtains a certificate of purchase, the purchaser at the sheriff's sale succeeds only to the equitable title of the judgment debtor, who, when he obtains the legal title by means of the patent, holds it in trust for the purchaser at the sheriff's sale. (*Kenyon vs. Quinn*, 41 Cal. 325.)

§ 467. **Title of Purchaser Not Dependent on Sheriff's Return.**—The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. (*Cloud vs. El Dorado Co.*, 12 Cal. 129.) While it is undoubtedly the duty of the sheriff to make a return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchase does not depend upon his performance of this duty. The purchaser rests for title upon the judgment, execution, levy, sale and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold. In Oregon and Washington, however, execution sales must be reported and confirmed at the next term of court.

Oregon. Sec. 296 I Hill's Codes, 1892.

Washington. Secs. 507-8 II Hill's Codes, 1891.

§ 468. **Title When Attachment Irregular—Intervening Purchaser.**—Unless the record shows that the levy of attachment is made in accordance with the statute, a purchaser at execution sale acquires no title as against the grantee of the attachment debtor by conveyance after attachment and before sale. (*Schwartz vs. Cowell*, 71 Cal. 306.)

§ 469. **Conveyance by Debtor after Attachment.**—If the judgment debtor make sale of real property after valid levy of attachment and before judgment, while no judgment lien will attach to the property, yet the title of a purchaser at execution sale will prevail over the title of the such grantee of the debtor. (*Riley vs. Nance*, 97 Cal. 203.)

§ 470. **Purchaser's Title Dependent upon Valid Unsatisfied Judgment.**—A purchaser at an execution sale must see, at his peril, that there is a valid judgment in existence and that the same has not been vacated or satisfied in any way, directly or indirectly; otherwise the power to make the sale has been destroyed. (*Bullard vs. McArdle*, 98 Cal. 355.)

§ 471. **Rights of Innocent Purchaser.**—An innocent purchaser of property sold under execution, who, as assignee of a redemptioner's right to a sheriff's deed, obtains title without notice of any irregularity in the sale, will be protected therefrom. (*Hudepohl vs. Liberty Hill W. and Mg. Co.*, 94 Cal. 588.)

§ 472. **Relief of Purchaser—Caveat Emptor.**—The doctrine of *caveat emptor* applies only to sales made upon valid judgments, and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment, and that he may possibly acquire nothing.

A somewhat different rule prevails in cases where particular property is the subject of sale by a specific adjudication, as where the interest of A in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A is essential; and where present, the decree binds him, and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title—it may not, in fact, be of any value—and the purchaser takes that risk. To that extent the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. (*Boggs vs. Hargrave*, 16 Cal. 559.) See also *Sec. 475, post.*

§ 473. Relief in Discretion of the Court.—

When there has been a defect in the proceedings on an execution sale, rendering the purchaser's title defective, the nature and extent of the relief are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems

that the ordinary rules as to mistakes of law should apply; and from such, courts of equity seldom relieve. (*Goodenow vs. Ewer*, 16 Cal. 461.)

§ 474. **When Purchaser Cannot Recover.**—In the case mentioned in the preceding paragraph, it was held, also, that the purchasers cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentations, undue influence or misplaced confidence.

§ 475. **Where Misrepresentation Was Used.**—Where a party purchased real estate at an execution sale upon the faith of the representations of the judgment creditor, that his judgment was the first on the property, when, in fact, there were prior incumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions. (*Webster vs. Haworth*, 8 Cal. 21.) See also *Sec. 472, ante*.

§ 476. **Sheriff's Deed.**—“If no redemption be made within six months after the sale, the purchaser,

or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed." (*California. Sec. 703 C. C. P.*)

§ 477. **Deed by Successor.**—"When the sheriff sells real estate under and by virtue of an execution or order of court, he, or his successors in office, shall execute and deliver to the purchaser, or purchasers, all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale." (*California. Sec. 107 Co. Govt. Bill, Statutes 1893, p. 373.*)

§ 478. **Deed Relates Back to Attachment.**—A sheriff's deed executed after execution sale in an attachment suit takes effect from the date of the attachment, if the levy was such as to create a lien. (*Riley vs. Nance, 97 Cal. 203.*)

§ 479. **Cloud on Title.**—An officer is bound to levy upon the defendant's interest in real estate, when instructed to do so, even though the records may show *prima-facie* that the defendant has transferred his interest in the property to a third party. But the party who has succeeded to that interest may have his remedy. There are numerous decisions in our own courts declaring the right of the party injured by such a cloud upon title to his remedy. In *Pixley vs. Huggins*, 15 Cal. 129, it is held that a deed from a sheriff upon an execution sale against the vendor of plaintiff would have the same effect in casting a cloud upon the title

as if the deed were made directly by such vendor. Such a deed from the sheriff, put on record, would create doubts as to the validity, as against the judgment creditor, of the previous transfer to plaintiff.

The jurisdiction of a court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be canceled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court that the deed casts a cloud over the title of the plaintiff. As in such case the court will remove the cloud, by directing a cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such a cloud must result. Where property rights are thus involved, the officer may resort for his protection to proceedings provided for in Sec. 689 Code Civil Procedure, and secure indemnity.

A sheriff's sale of real property under a judgment for the foreclosure of a lien would not create a cloud upon the title or in any manner affect the rights of one owning the fee and in the actual possession of the land, but not a party to the judgment. (*Archbishop of S. F. vs. Shipman*, 69 Cal. 586.)

CHAPTER XV.

EXEMPTIONS FROM EXECUTION.

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§ 480. **Exemptions, Generally.**—In all the states and territories to which this work is particularly applicable, provision is made for the exemption from forced sale of a certain amount of personal property, consisting substantially of those articles without which the debtor would be unable to live and earn necessary support for himself and family. Statutory provision is also usually made for the exemption of real property to a certain amount, for the use of the debtor as a home. The method by which the claimant may avail himself of the homestead exemption, the provisions as to occu-

pancy and also as to the value of the property thus protected, differ somewhat in the different states.

§ 481. **Pacific Coast States.**—The exemption statutes in nearly all of the other Pacific States are modeled after and are very similar to those of California, both as to personal and real property. The California statute is therefore given first in order, and then, under separate headings, the principal particulars of difference in the other states and territories are pointed out, with references to the respective statutes.

§ 482. **California—Personal Property Exemption.**—"The following (personal) property is exempt from execution, except as herein otherwise specially provided:—

"1. Chairs, tables, desks and books, to the value of \$200, belonging to the judgment debtor.

"2. Necessary household, table and kitchen furniture belonging to the judgment debtor, including one sewing machine, stoves, stovepipes and furniture, wearing apparel, beds, bedding and bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions actually provided for individual or family use sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month.

"3. The farming utensils or implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses or mules for one month; also, all seed, grain or vegetables actually

provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of \$200, and seventy-five beehives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business.

"4. The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records and office furniture of a notary public; the instruments and chest of a surgeon, physician, surveyor or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school-teachers and music teachers, and their necessary office furniture; also, the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps and office furniture of a seacher of records, necessary to be used in his profession.

"5. The cabin or dwelling of a miner, not exceeding in value the sum of \$500; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of \$500, and two horses, mules or oxen, with their harness and food for such horses, mules or oxen for one month, when necessary to be used in any whim, windlass, derrick, car, pump or hoisting gear, and also his mining claim actually worked by him, not exceeding in value the sum of \$1,000.

"6. Two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses,

by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living, and one horse with vehicle and harness, or other equipments, used by a physician, surgeon, constable or minister of the gospel, in the legitimate practice of his profession or business, with food for such oxen, horses, or mules for one month.

"7. One fishing boat and net, not exceeding the total value of five hundred dollars, the property of any fisherman, by the lawful use of which he earns a livelihood.

"8. Poultry not exceeding in value \$25.

"9. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this State, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessities of life, the one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment to satisfy debts so incurred.

"10. The shares held by a member of a homestead association duly incorporated, not exceeding in value \$1,000, if the person holding the shares is not the owner of a homestead under the laws of this State. All the nautical instruments and wearing apparel of any master, officer or seaman of any steamer or other vessel.

"11. All moneys, benefits, privileges or immunities accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed \$500.

"12. All fire engines, hooks and ladders, with the

carts, trucks and carriages, hose, buckets, implements and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this State.

“ 13. All arms, uniforms and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor.

“ 14. All court houses, jails, public offices and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers and appurtenances belonging and appertaining to the jail and public offices belonging to any county or to any city and county of this State, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State.

“ No article, however, or species of property mentioned in this section, is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage thereon.” (*California. Sec. 690 Code Civil Procedure.*)

§ 483. **California—Real Property Exemption.**

—The homestead, consisting of the dwelling house in which the claimant resides and the land on which it is situated, claimed by declaration in writing, acknowledged and recorded, is only subject to execution in certain cases when it exceeds the amount of the homestead exemption, and also “in satisfaction of judgments obtained:

"1. Before the declaration of homestead was filed for record, and which constitute liens on the premises.

"2. On debts secured by mechanics, contractors, sub-contractors, artisans, architects, builders, laborers of every class, material men's or vendors' liens upon the premises.

"3. On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.

"4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." (*California. Secs. 1237, 1241, 1262-4 Civil Code.*) The amount of the homestead exemption is \$5,000 for the "head of a family," and \$1,000 for any other person. (*California. Sec. 1260 Civil Code.*)

It will be noticed that the recording of a declaration of homestead at any time before a judgment is obtained and becomes a lien upon the premises, is effectual to protect the property from execution sale.

When the value of the property exceeds the amount of the statutory exemption, an appraisement may be had upon petition of the judgment creditor after levy of execution, followed by a division of the property or an execution sale of the whole under order of court, and payment to the creditor of the surplus over the statutory amount. (*Secs. 1245-59 Civil Code.*)

In case of the death of a married person, leaving a homestead of record, the same vests in the survivor and is not subject to the debts of either spouse at the time of the death. If no homestead has been selected, it is the duty of the court to set apart a homestead for the use of the survivor and minor children, if any. (*California. Sec. 1265 Civil Code; Secs. 1465, 1474-5*

C. C. P.) In either case, the property retains and has all the homestead characteristics, and is not subject to subsequent debts of the survivor. (*Tyrrell vs. Baldwin*, 78 Cal. 470.)

Liens existing against the homestead at the time of the decease are to be paid, either in whole or part, out of the funds of the estate, and such liens can only be enforced for any deficiency after proof, allowance and part payment out of the general funds of the estate. (*California. Sec. 1475 Code Civil Procedure.*)

§ 484. **Arizona—Personal Property Exemption.**—Every family is entitled to personal property to the value of \$1,000, as exempt from execution, the same to be designated by the head of the family, or set apart by commissioners in case of disagreement between the owner and the levying officer as to the value. (*Secs. 1956-61 Revised Statutes, 1887.*)

§ 485. **Arizona—Real Property Exemption.**—A homestead, not confined to the land on which the claimant resides, and not exceeding \$4,000 in value, may be selected by any head of a family by written declaration, sworn to and recorded, and such property is then exempt from forced sale. (*Secs. 2071-2, 2085 Revised Statutes, 1887.*) If the value exceeds the homestead exemption, proceedings may be taken to subject the surplus to execution by appraisement and division or sale of the same. (*Secs. 2078-83 Revised Statutes, 1887.*) In case of death, the property vests in the survivor or children, and is likewise protected from forced sale. (*Sec. 2077 Revised Statutes, 1887.*)

§ 486. **Colorado—Personal Property Exemption.**—All necessary wearing apparel and also the fol-

lowing other personal property is "exempt from levy and sale upon any execution or writ of attachment or distress for rent :—

"1. Family pictures, school books and library.

"2. A seat or pew in any house or place of public worship.

"3. The sites of burial of the dead.

"4. All wearing apparel of the debtor and his family; all bedsteads and bedding kept and used for the debtor and his family; all stoves and appendages kept for the use of the debtor and his family; all cooking utensils, and all the household furniture not herein enumerated, not exceeding one hundred dollars in value.

"5. The provisions for the debtor and his family, necessary for six months, either provided or growing, or both, and fuel necessary for six months.

"6. The tools and implements, or stock in trade, of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value.

"7. The library and implements of any professional man, not exceeding three hundred dollars.

"8. Working animals to the value of two hundred dollars.

"9. One cow and calf, ten sheep and the necessary food for all the animals herein mentioned, for six months, provided or growing, or both; also, one farm wagon, cart or dray, one plow, one harrow, and other farming implements, including harness and tackle for team, not exceeding fifty dollars in value." (*Sec. 2562 Mills' Ann. Stats., 1891.*)

Any of this exempt property, however, may be sold for taxes or on execution for the purchase price, and

tools, implements, working animals, books and stock in trade, not exceeding \$300 in value, of any mechanic, miner, or other person not being the head of a family, used and kept for the purpose of carrying on his trade and business, are exempt from levy and sale on any execution or writ of attachment while such person is a *bona-fide* resident of the State. (*Sec. 2562 Mills' Ann. Stats., 1891.*) If the debtor is engaged in removing his property from the State, these exemptions do not apply except to wearing apparel, beds and bedding. (*Sec. 2565 Mills' Ann. Stats., 1891.*)

If the head of a family die, desert or cease to reside with them, they are entitled to the same exemptions enumerated. (*Sec. 2563 Mills' Ann. Stats., 1891.*) One-half of the wages of the debtor, earned within thirty days preceding the levy, are also exempt; provided, that such exemption shall not exceed \$30, and that the debtor be the head of a family or the wife of the head of a family, and such family be dependent upon such wages for support. (*Sec. 2567 Mills' Ann. Stats., 1891.*) When the debtor dies or absconds, and leaves his family, pension money by law exempt to him is also exempt to his wife or children, or either of them. (*Sec. 2569 Mills' Ann. Stats., 1891.*)

§ 487. **Colorado—Real Property Exemption.**

—A homestead valued at not to exceed \$2,000 may be declared by the entry of the word "homestead" "in the margin of his recorded title;" and the property is then exempt from execution only during occupancy "by the owner or his or her family." (*Secs. 1631-3 General Statutes, 1883.*) Upon affidavit filed by a judgment creditor, showing that the value of the property exceeds the homestead exemption, execution sale

may be had and surplus applied on the judgment. (*Sec. 1637 General Statutes.*)

In case of death the homestead vests in the survivor or minor children, and can be held for decedent's debts only in case no such heirs remain. (*Sec. 1634 General Statutes.*)

§ 488. **Idaho—Personal and Real.**—The personal property exemption is substantially the same as in California (*Sec. 482, ante*), the following being the principal points of difference: The value of exempt household furniture, bedding, etc., is limited to \$300; farming tools, \$300; mechanic's tools, \$500; miner's cabin, \$500, and tools, \$200. A miner is also allowed a water right not to exceed 160 inches of water, and a prospector may claim two horses and equipments not exceeding in value \$250. There is no exemption of poultry. (*Revised Statutes, 1887, Sec. 4480.*)

The homestead exemption in Idaho is the same as in California (*Secs. 3035-59 Revised Statutes, 1887*) and similar provision is made for a probate homestead. (*Secs. 5441-9 Revised Statutes, 1887.*)

§ 489. **Montana—Personal and Real.**—The personal property exemption is substantially the same as in California (*Sec. 482, ante*), but differs particularly as follows: The debtor is allowed chairs, tables, desks and books to the value of \$100, besides his household furniture, and also fifty domestic fowls. A farmer is allowed farming utensils not exceeding in value \$600, and a miner his cabin and tools not exceeding in value \$500. As to exemptions, no exception is made as to judgments for purchase price. There is no exemption as to fishing boats. The exemption only applies to *bona-fide* residents. (*Sec. 321 Code Civil Procedure.*)

The homestead exemption extends to land not exceeding 160 acres used for agricultural purposes, and the improvements, not included in any town plot, city or village, or not more than one-fourth of an acre being within a town plot, city or village, and the improvements owned and occupied by a resident of the territory; but the homestead shall not exceed \$2,500 in value. (*Sec. 322 Code Civil Procedure.*) Provision is also made for a probate homestead. (*Sec. 134 Probate Practice Act.*)

§ 490. **Nevada—Personal and Real.**—The exemption, as to both personal and real property, is almost identical with that of California, as set out in Secs. 482–3 of this work, *ante*. The exemption of wages, however, is limited to \$50, and only when necessary for the support of the debtor or his family. Tables, desks and books are only exempt to the amount of \$100. (*Secs. 3243, 3267 General Statutes, 1885; Statutes, 1887, p. 78.*) Tenants in common may declare upon their respective estates in land. (*Secs. 539–542 General Statutes, 1885.*)

§ 491. **Oregon—Personal Property Exemption.**—The principal points of difference in the personal property exemption from that of California (*Sec. 482, ante*) are as follows: The debtor is allowed books, pictures and musical instruments to the value of \$75, wearing apparel for himself to the value of \$100, and for each member of his family to the value of \$50. The exemption of tools, implements, apparatus, team, vehicle, harness or library only extends to the value of \$400, and of household goods to \$300. (*Sec. 282 I Hill's Codes, 1892.*) This property is exempt from

execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him, and not otherwise. The earnings of the debtor within thirty days are also exempt when necessary for the use of his family. (*Sec. 313 I Hill's Codes, 1892.*)

§ 492. **Oregon—Real Property Exemption.**—In this State “the homestead, being the actual abode of and owned by any family or some members thereof, is exempt; but such homestead shall not exceed fifteen hundred dollars, nor exceed one hundred and sixty acres in extent, if not located in a town or city laid off into blocks and lots. If located in any such town or city, then it shall not exceed one block; but in no instance shall such homestead be reduced to less than twenty acres nor one lot—regardless of value.” In case the homestead exceed \$1,500 in value, provision is made for the subjection of the excess to execution by appraisal and division or sale. (*Oregon. Laws of 1893, p. 93.*)

§ 493. **Utah—Personal Property Exemption.**—As to personal property exemption, the following are the particular points of difference from the statute in California (*Sec. 482, ante*): The debtor is allowed household furniture to the value of \$300. A farmer is allowed farming utensils to the value of \$300; a mechanic may claim necessary tools not exceeding \$500 in value; and a miner is entitled to his cabin, not to exceed \$500 in value, and tools and appliances to the value of \$200. One-half the earnings of the debtor for personal services, within sixty days preceding the

levy, are exempt when necessary for the use of his family. There is no exemption as to poultry or fishing boats. None of the exemptions authorized are for the benefit of non-residents or persons about to depart from the territory.

§ 494. **Utah—Real Property Exemption.**—The homestead exemption extends to land and improvements, owned by the head of a family and to be selected by him, not exceeding in value the sum of \$1,000 for the debtor, and the further sum of \$500 for his wife, and \$250 for each other member of the family. If the home be of greater value, the debtor may allow a sale, in which case he is to receive in money the value of the homestead; or he may elect to have the property partitioned. (*Sec. 570, Sub. 11, Code Civil Procedure.*) Provision is also made for a probate homestead. (*Sec. 2, Chap. 5, Probate Act.*)

§ 495. **Washington—Personal Property Exemption.**—The following personal property is exempt:—

- “1. All wearing apparel of every person and family.
- “2. All private libraries, not to exceed five hundred dollars in value, and all family pictures and keepsakes.
- “3. To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars, coin, in value. The other household goods and utensils and furniture specified above shall, on the demand of the officer having the execution or attachment in hand, be selected by the husband if present; if not present they shall be selected by his wife, and in case

neither husband nor wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils and furniture equal in value to said five hundred dollars and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above, shall be *prima-facie* evidence: (1) That such household goods, utensils and furniture are exempt from execution and attachment; (2) that the value of the property so selected is not over five hundred dollars.

“4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months; provided, that in case such householder shall not possess or shall not desire to retain the animals named above, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in Subdivision 3, and said selection shall have the same effect as selections made under Subdivision 3 of this section.

“5. To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used upon the farm, not exceeding in value five hundred dollars in coin; also one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes.

"6. To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars in coin.

"7. To a physician, his library, not to exceed in value five hundred dollars in coin; also one horse, with harness and buggy; the instruments used in his practice, and medicines not exceeding in value two hundred dollars in coin.

"8. To attorneys, clergymen and other professional men, their libraries, not exceeding one thousand dollars in coin value; also office furniture, fuel and stationery, not exceeding in value two hundred dollars in coin.

"9. All firearms kept for the use of any person or family.

"10. To any person, a canoe, skiff or small boat, with its oars, sails and rigging, not exceeding in value two hundred and fifty dollars.

"11. To a person engaged in lightering for his support or that of his family, one or more lighters, barges or scows, and a small boat, with oars, sail and rigging, not exceeding in the aggregate two hundred and fifty dollars, in coin, value.

"12. To a teamster or drayman engaged in that business for the support of himself or that of his family, his team, consisting of one span of horses or mules or two yoke of oxen, or a horse and mule, with harness, yokes, one wagon, truck, cart or dray.

"13. To a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin, in value.

"14. A sufficient quantity of hay, grain or feed to

keep the animals mentioned in the several subdivisions of this chapter, for six weeks. But no property shall be exempt from an execution issued upon a judgment for a price thereof, or any part of the price thereof, or for any tax levied thereon. Each person shall be entitled to select the property to which he is entitled under the several subdivisions of this act." (*Sec. 486 II Hill's Codes, 1891.*)

Pension money is also exempt, and also the personal earnings of the debtor within sixty days, when necessary for the use of his family. (*Secs. 487, 526 II Hill's Codes, 1891.*)

§ 496. **Washington—Real Property Exemption.**—A homestead, not to exceed \$1,000 in value, is exempt from attachment and execution to every householder, being the head of a family, while occupied as such by the owner or his or her family. Such homestead may be selected at any time before sale. (*Sec. 481 II Hill's Codes.*) A judgment creditor may subject the homestead to execution sale upon filing affidavit showing the value to be in excess of the statutory exemption; and after sale the surplus over that amount shall be paid to the creditor. (*Sec. 484 II Hill's Codes.*) In case of death, the surviving spouse and minor children are entitled to the homestead, and it is not liable for debts of the deceased. (*Sec. 482 II Hill's Codes.*)

§ 497. **Liberal Construction of Statute.**—The courts uniformly give to the statute of exemptions a liberal construction, as intended to enable the debtor to follow his vocation, and earn a support for himself and family. (*In the matter of McManus, insolvent, 87 Cal. 292.*)

§ 498. **Burden of Proof.**—The burden is on him who claims exemption of property under the statute to prove it. (*Murphy vs. Harris*, 77 Cal. 194.)

§ 499. **Exempt Property May Not Be Attached.**—In all these cases in which the property is declared to be “exempt from execution and forced sale,” it is of course exempt also from attachment, the only purpose of the latter writ being to hold property in *statu quo* until judgment and execution can be had.

§ 500. **Difficulties in Determining Exemptions.**—Between the desire of the plaintiff to secure his debt, and the defendant to hold as much of his property as he can, the officer often finds himself perplexed as to how he can faithfully discharge his duty and do justice to both contestants. He should exercise the same sound discretion, as well as diligence, in securing property under the writ, as though he were in pursuit of a claim of his own.

In California, Sec. 690 Code Civil Procedure (*Sec. 482, ante*) declares what personal property shall be exempt from execution. In specifying the different kinds of property, it does not in every instance state the quantity that shall be exempt, and, hence, officers sometimes find themselves in a dilemma as to the limit to which they are bound to go. The law allows the judgment debtor to retain “necessary household, table and kitchen furniture.” When certain household furniture was claimed as exempt from execution (*Haswell vs. Parsons*, 15 Cal. 266), the fact that the number of beds claimed—six in all—was greater than was required for the immediate and constant use of the family, was held to be no objection. Plaintiff was a farmer, house-

holder and head of a family, having a wife and three children dwelling with him. The court held that while it was possible that a less number of beds would have accommodated the plaintiff and his wife and children, yet it would be a very narrow construction of the statute to limit the exemption to the number required for immediate and constant use.

By the first and second subdivisions of Sec. 690 of the Code of Civil Procedure, there is exempted certain household furniture, wearing apparel and provisions for three months for the use of the family. This exemption is for the benefit of all classes of judgment debtors, whatsoever may be their vocations, because these articles are essential to all families. By reference to the last sentence of Subdivision 14 of Sec. 690, it will be seen that household furniture and any other species of property mentioned in that Section, may be levied upon under execution (and attachment) issued for its price or purchase money thereof.

The next succeeding four subdivisions of the Section were intended to exempt such articles as were used by the judgment debtor in earning a support for himself and family in his particular vocation. Hence, the third subdivision exempts the farming implements of a farmer, and two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses or mules, for one month, and all seed, grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of \$200, etc. This exemption is to enable the judgment debtor to earn a support by farming, secures to him the means appropriate to that end, and is intended to apply only to oxen, horses or mules,

suitable and intended for the ordinary work conducted on a farm. (*Robert vs. Adams*, 38 Cal. 383.)

The provisions of the third subdivision of Sec. 690 Code Civil Procedure, with the exception of that exempting a horse and vehicle, relate exclusively to exemptions in favor of judgment debtors who are farmers. (*Robert vs. Adams*, 38 Cal. 383; *Murphy vs. Harris*, 77 Cal. 194.)

The fourth subdivision exempts the tools or implements of a mechanic or artisan, *necessary to carry on his trade*, the notarial seal, records and office furniture of a notary public, the instruments and chests of a surgeon, physician, surveyors or dentist, *necessary to the exercise of their profession*, with their professional libraries and necessary office furniture, etc.

The fifth subdivision exempts the cabin of a miner, his sluices, pipes, hose, windlass, derrick, cars, pump, tools, implements and appliances *necessary for carrying on any mining operations*, etc. And here comes in the question as to what appliances may be exempt from execution as fixtures belonging to the realty, and not removable as personal property, and this question is treated upon elsewhere in this volume under the title of "Fixtures." (*Chap. XX, post.*)

The sixth subdivision exempts two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses, *by the use of which* they "or other laborer" habitually earns his living.

If an officer go upon a ranch or farm to levy upon the personal property of the debtor, and find there, of horses or other animals attachable, only the number that is specified by statute as exempt from execution, he will not be justified in refraining from levying upon

them for that reason alone, for it may be that the debtor may have other property of a similar kind elsewhere. If it is in the officer's knowledge that the debtor has no other animals of that kind elsewhere, a levy upon those present, that are by law exempt, would be a superfluous proceeding. But if he has been directed by the plaintiff or his attorney to make the levy, he should do so, if they or either of them have reason to believe the debtor is not entitled to the exemption. He may require an indemnity bond if there be any doubt in his mind, and will be protected by the bond.

Where the debtor has several horses, and two are exempt from execution, he may elect which shall be exempt; but if he has some not in the jurisdiction of the officer, and so beyond the reach of the execution, and there is only one within the reach of the execution, he cannot defeat the creditor's levy on that one by electing to keep it. Such a course would be using the statute, which was intended for beneficent purposes, as a means of evasion and fraud.

§ 501. **Claim by Teamster.**—Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. (*Calhoun vs. Knight*, 10 Cal. 394.)

The wagon sheet and driving lines of a teamster are exempt "when useful and convenient to use" with the horses expressly exempted by the statute. (*In re Bowman*, 83 Cal. 153.) See also *Secs. 501-2, 504, post*.

§ 502. **Teamster Defined.**—In the sense of the statute of exemptions, one is a "teamster" who is en-

gaged with his own team or teams in the business of teaming, viz., in the business of hauling freight for others for a consideration, by which he habitually supports himself and family, if he has one. While a teamster need not drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter or other mechanic who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a "teamster" in the sense of the statute. (*Brusie vs. Griffith*, 34 Cal. 302.)

§ 503. **"Laborer" Defined.**—By "other laborer," as used in the sixth subdivision of Sec. 690 Code Civil Procedure, is meant one who labors by and with the aid of his *team*, and not by the aid of a pick and shovel, or the implements of other trade or vocation. (*Brusie vs. Griffith*, 34 Cal. 302.)

§ 504. **Teamster or Laborer.**—Where B, who claimed two horses, etc., as exempt, was a clerk in a store, at a stated salary, and had purchased said horses, etc., mainly to furnish employment for his son, who was seventeen years old, and by whom exclusively the team was used habitually in hauling freights for said store and for other parties, and in delivering goods from said store to customers, all of which was done for the benefit of B and his family: *Held*, that B was neither a teamster nor other laborer in the statutory sense. (*Brusie vs. Griffith*, 34 Cal. 302.)

In the case of *Dove vs. Nunan*, 62 Cal. 399, the property in controversy consisted of two horses and a

wagon, which were claimed by the plaintiff as exempt from execution. The court said: "The court below found that 'the plaintiffs were and are a firm doing business as coal dealers. . . . That the plaintiffs used the property sued for as teamsters. That they hauled coal and other commodities for others, for hire and pay, and received money therefor, all of which was expended in the support of plaintiffs and their families, all of whom resided in the same house and ate at the same table. That as coal dealers, and for the purpose of delivering coal at retail and in small quantities, the plaintiffs had and owned a smaller cart, truck or wagon, and one other horse. That the only use which the plaintiffs made of the wagon and horses—the subject of this suit—for themselves, other than as teamsters for pay, was in hauling coal and wood from plaintiff's coal yard, and other coal and wood yards, to the place where the plaintiffs retailed the same, as above found herein.'

"The fact that the plaintiffs used the horses and wagon in question as teamsters for hire, and that they expended the money thus received in the support of themselves and their families, did not exempt the property from execution. In order to entitle a party to claim as exempt from execution two horses, etc., under the sixth subdivision of Sec. 690, he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, *and that he habitually earns his living* by the use of such horses, etc. (*Brusie vs. Griffith*, 34 Cal. 302.)" See also *Secs. 500–2, ante*.

§ 505. **Exemption of Stallion.**—In the case of *McCue vs. Tunstead*, 65 Cal. 506, the Supreme Court says:—

“The court found in substance that the plaintiff was the owner and in the possession of a farm of about one hundred and fifty acres of land, which he cultivates for raising grain, etc., and that the horse which this action was brought to recover was used as a work horse on said farm—sometimes singly and sometimes doubly. It is also found that the plaintiff is the publisher of a weekly newspaper and the proprietor of patent medicines, although his main reliance for support is upon his farm, ‘and almost the entire income from that is from the services of said horse as a stallion and the agistment of mares for breeding to him.’

“The plaintiff is the owner of other horses pledged for a debt owing by him, and in the possession of the pledgee.

“In addition to ‘the farming utensils or implements of husbandry of the judgment debtor,’ the law exempts from execution *two horses*. (*Code Civil Procedure, 690, Subdivision 3.*) The findings establish beyond doubt that the plaintiff employed this horse in husbandry. He was a farm horse in the same sense that the plows, harrows and wagons used on the farm were utensils or implements of husbandry. Conceding that some of the uses to which the horse was put were not strictly in the line of husbandry, he was, nevertheless, one of two horses owned by the judgment debtor, and employed by him in husbandry. The law does not specify how much or what use shall be made of ‘the farming utensils or implements of husbandry,’ or of the two horses exempted from execution. They are exempt because owned by a judgment debtor engaged in husbandry. And in order to make them exempt, it is not necessary that the owner of them should devote himself exclusively to husbandry. Such is not the lan-

guage of the law. It does not say the farming utensils, etc., of a husbandman or farmer shall be exempt, but the farming utensils, etc., of husbandry; that is, utensils, etc., employed by the judgment debtor in husbandry or farming. This is the obvious meaning of the language, and we do not feel at liberty to hold that when a judgment debtor shows that he is carrying on a farm, and has but two horses which he uses in farming, that they are not exempt because he sometimes uses them for some other purposes. That would necessitate the importation of something into the law which it does not now contain."

In an earlier case it was also held that a stallion, not used as a work horse on a farm, but kept for the service of mares, is not exempt from execution. (*Briggs vs. McCullough*, 36 Cal. 542.)

§ 506. **Tools and Implements of Trade—Construction.**—When the statute exempts "tools and implements," the word "implement" is broader than the word "tool," and includes any instrument needed and used for the purpose of carrying on the trade or business of the debtor. (*In re McManus*, 87 Cal. 292.)

A turning lathe and appliances, necessary to a mechanic and machinist in his business, is exempt from execution. (*Matter of Robb*, 99 Cal. 202.)

A jeweler's safe used in his business as a jeweler and watch repairer is exempt from execution, under the California statute. (*In the matter of McManus Insolvent*, 87 Cal. 292.)

§ 507. **Steam Thresher—When Not Exempt.**—An expensive steam-threshing machine and outfit, owned in common by several farmers and used by them

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upon their own lands and also in doing work for others for hire, is not exempt as "farming utensils." (*In re Baldwin*, 71 Cal. 74.)

§ 508. **Provisions for Family Use.**—That the courts incline to a very liberal construction of the exemption laws is evident in a recent decision by which it would seem that fire wood actually provided for family use may be included as "provisions for family use." (*In the matter of Bowman, Insolvent*, 83 Cal. 153.)

§ 509. **Salaries of Officers, etc.**—Moneys in the hands of federal, state or county officers are exempt from execution or garnishment against a defendant to whom they may be due. (*Freeman on Executions*, Sec. 132.)

§ 510. **Waiver of Exemption by Officer.**—Although in California the law provides that "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment," may be claimed as exempt from execution, when such earnings are necessary for the use of his family, etc., there is recorded, in 59 Cal. 107, a case wherein a county officer's monthly salary was applied on an execution. It would seem, however, that in that case the auditor and treasurer must have been in sympathy with the judgment creditor, for otherwise the sheriff might easily have been frustrated in making the levy. And, even when the warrant for the debtor's salary came into the sheriff's hands, the sale thereof might have been prevented if the debtor had claimed his privilege of exemption. Instead of doing so, however, he allowed the sale to

go on without protest, and received from the sheriff the overplus of the sale. The debtor subsequently made application for a writ of mandamus to the county treasurer, to compel him to issue another warrant for the salary, but the application was refused. Having had one warrant drawn and delivered to his lawfully constituted agent, the sheriff, and having obtained the benefit of the proceeds of the sale, by payment of judgments against him, he had not the right to have another warrant for the same services drawn and delivered to him, and obtain double payment from the county. The court held that "the debtor must have known all the facts as to the levy, seizure and sale of the warrant by the sheriff, and his conduct was a ratification of the acts of the sheriff, though the warrant could not be levied on under a writ of execution."

The above construction of the exemption law secures—as the Legislature intended it should—to the several classes mentioned, provision for earning their support.

§ 511. **Interest in Common.**—Personal property which is exempt from forced sale on execution is none the less exempt because the judgment debtor owns an undivided interest in it in common with a stranger to the judgment; and where a sheriff, on ascertaining that property which has been attached is exempt from execution, refuses to release it without an undertaking, he exceeds his authority and violates his duty. Such an undertaking is void for want of consideration, and for having been illegally exacted by the sheriff under color of his office. It is the duty of the sheriff to release exempt property, without an undertaking. (*Servanti vs. Lusk*, 43 Cal. 238.)

§§ 512-515 EXEMPTIONS FROM EXECUTION. .

§ 512. **Exemption a Personal Right.**—The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election, and where the party fails to demand it, he thereby waives his privilege. (*Borland vs. O'Neal*, 22 Cal. 504; *Gavitt vs. Doub*, 23 Cal. 78.)

§ 513. **Debtor Must Claim within a Reasonable Time.**—An execution debtor who has more horses than the number exempt by law, may elect which he claims as exempt, but such election must be made and the officer notified thereof either at the time of the levy or within a reasonable time thereafter, or the right to elect will be deemed waived. (*Gavitt vs. Doub*, 23 Cal. 78; *Stanton vs. French*, 83 Cal. 194.)

§ 514. **Unreasonable Delay in Claiming Exemption.**—Where several horses owned by an execution debtor were levied upon, and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy: *Held*, that the right of election had been lost by the unreasonable delay in exercising it, and that the officer was justified in selling the property. (*Borland vs. O'Neal*, 22 Cal. 505.)

§ 515. **What Constitutes a Reasonable Time.**—The notice of claim should be promptly given by the debtor, in order that the officer may levy on other property, in the place of that selected, to secure the debt, if there is any. What will constitute a reasonable time will, therefore, depend upon the particular circumstances of each case. There may be cases where a notice of the selection given at any time

before the sale would be sufficient, where it appears that no injury has been caused by the delay.

In a suit against plaintiff in execution, for the value of household furniture sold thereunder, as being exempt, defendant offered to show that plaintiff agreed to place the property in the hands of a third person, to be sold for the benefit of defendant, the creditor: *Held*, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale. (*Haswell vs. Parsons*, 15 Cal. 267.)

Where a party was absent in San Francisco, at the time his furniture was sold on execution, on account of sickness in his family, it is a sufficient excuse for not claiming the exemption at the time, the defendant, plaintiff in execution, being aware of such claim, it having been made on a previous seizure. (*Haswell vs. Parsons*, 15 Cal. 266.)

§ 516. **Sale after Claim Made.**—A sheriff who levies upon and sells property exempt from execution is liable for the value of such property, if claimed as exempt prior to the sale.

§ 517. **Claimant Must Notify Officer.**—The officer is under no obligation to hunt up the debtor in advance of the levy, in order to procure a selection by him. The debtor waives his right by failing to claim it; and a claim under one execution, when no sale was made under it, is not sufficient when the property is levied upon and sold under a subsequent execution.

§ 518. **Claim of Exemption—How Made.** The requirements of the debtor upon claim of exempt property by him differ in different states. In Arizona it is

sufficient that he shall "designate" the property which he claims as exempt and "may point out the portions to be levied upon" (*Sec. 1957 Revised Statutes, 1887*), while in Washington the debtor is required to deliver to the officer making the levy "a list by separate items of the property he claims as exempt." (*Sec. 490 II Hill's Codes, 1891.*)

Unless the statute requires the claim to be in writing, however, as in the State named, or as in the case of claim for exemption of wages, it would seem that the claim of exemption may be made orally to the officer, and that he is bound to take notice of the claim thus made. Personal property plainly exempt, such as household furniture and the like, actually in use by the debtor, should not be levied upon, even if not claimed as exempt.

When a debtor has more property of a particular kind than is exempt, and a writ is levied upon a portion, leaving as much as the law exempts, and thereafter the debtor claims a portion of the property levied upon, the residue being insufficient to satisfy the writ, the debtor, in order to make good his claim of exemption, must offer to surrender to the officer the other property of the same general kind, or so much as may be necessary to satisfy the writ. (*Keybers vs. McComber, 67 Cal. 395.*)

§ 519. **Joint Claim—Effect.** A notice of claim of exemption, signed by two persons, is sufficient as a claim for either separately. (*Stanton vs. French, 83 Cal. 194.*)

§ 520. **Priority of Homestead over Mortgage.**
—A declaration of homestead by the wife, after the

execution but before the recording of a mortgage by the husband, prevents the enforcement of the mortgage against the property. (*First National Bank vs. Bruce*, 94 Cal. 77.)

§ 521. **Grain on Homestead Land.**—The fact that land is homesteaded does not of itself exempt from execution all the grain grown thereon. It would be giving a strained interpretation to the language of the third subdivision of Sec. 690 of the Code of Civil Procedure (California), to say it was intended, *in addition* to all the crop grown upon the homestead, that the debtor should be secured seed grain to the value of \$200. It is obvious it is meant that only grain to that amount shall be exempt. (*Hogan vs. Amick*, 62 Cal. 401.)

In the case of *Dascey vs. Harris*, 65 Cal. 357, an action in replevin, the following is the opinion of the court: "The wheat which is the subject of this action was grown on the homestead of plaintiffs. On the 15th of March, 1879, the plaintiff, John Dascey, filed his petition in insolvency, and such proceedings were had that on the 29th of April, 1879, he made an assignment of all his property, real and personal, to the defendant, assignee in insolvency. No property was specifically described in the assignment, but words of general description only were used. At the time of filing the petition, the premises constituting the homestead had been sown with wheat, which was then growing, and continued to be growing until after the assignment. Some time in August, 1879, after the wheat so raised on the premises had ripened, and been harvested, threshed and sacked by said John Dascey, the defendant, as assignee, under an order of the County Court, seized the

grain on the premises, and caused it to be removed therefrom. The wheat when so taken was of the value of \$1,267. It does not appear that evidence was given of any damage to plaintiffs beside the value of the wheat.

"At the time of the assignment the wheat in controversy had not such an existence as that it passed to the assignee. At that time the growing wheat was a part of the homestead, at least to the extent that a conveyance of the homestead would have passed the growing crop.

"Judgment reversed and caused remanded, with instructions to render judgment on the findings in favor of plaintiffs for the possession of the property sued for; or in case a delivery cannot be had, for \$1,267, with interest thereon from the date of the seizure by defendant, and for costs."

§ 522. **Joint Ownership in Property Claimed.**—Property owned jointly by husband and wife and habitually used by the husband alone in earning a living, cannot be by him claimed as wholly exempt as against an execution against both. (*Stanton vs. French*, 83 Cal. 194.)

§ 523. **Partial Use of Building for Hotel.**—The use of a building partly, or even chiefly, for hotel purposes, for which the owner rents a portion, does not deprive him of his homestead exemption, if the building is and continues to be the *bona-fide* residence of the family. (*Heathman vs. Holmes*, 94 Cal. 291.)

§ 524. **How Homestead May Be Levied Upon.**—There is no lien of the judgment upon a homestead until the levy of an execution; and that levy creates no

lien, except for the purpose of and as a foundation for instituting and carrying on proceedings to have an appraisal and sale under the statute. The homestead, no matter what may be its actual value, cannot be subjected to execution or forced sale, except in the manner pointed out by statute. (*California. Secs. 1241, 1245-59 Civil Code.*)

Arizona. Secs. 2078-83 Revised Statutes, 1887.

Colorado. Sec. 1637 General Statutes, 1883.

Nevada. Sec. 541 General Statutes, 1885.

Washington. Sec. 484 II Hill's Codes, 1891.

§ 525. **Homestead Insurance Exempt.**—If the wife declares a homestead on common property, and the husband procures a policy of insurance on the house thereon, and the house is destroyed by fire, the sum due from the insurance company is not subject to garnishment by a judgment creditor of the husband. (*Houghton vs. Lee, 50 Cal. 101.*)

§ 526. **When Judgment Is Not a Lien.**—Where a homestead was declared after an attachment on the land and a judgment in a Justice's Court, but no abstract had been filed or recorded in the recorder's office, it was held (*Wilson vs. Madison, 58 Cal. 1*) that at the time of the declaration of homestead, the judgment did not constitute a lien upon the premises within Section 1241 of the Civil Code, and a sale under the judgment conveyed no title.

§ 527. **Judgment No Lien upon Homestead.**—A judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor, which is not exempt from execution. (*Bowman vs. Norton, 16 Cal. 214.*)

§ 528. **Judgment after Filing Homestead.**—

A judgment obtained after the filing of a declaration of homestead cannot be enforced against a homestead, although an attachment may have been levied upon the premises before the filing of the declaration. (*Sullivan vs. Hendrickson*, 54 Cal. 258.)

§ 529. **Levy on Homestead Void.**—

The sheriff of Calaveras county was sued on his official bond for selling under execution against J. Kendall certain property claimed by plaintiff, as a homestead. The Supreme Court decided, in 10 Cal. 16, that no damage had or could result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury.

§ 530. **Cloud on Title of Homestead.**—

The right of homestead having once attached, and not having been alienated, a deed from the sheriff, under an execution against the husband, would be a cloud upon the title, and prevent the free alienation of the property by the husband and wife. (*Dunn vs. Tozer*, 10 Cal. 167.)

Where a homestead is sold by the sheriff, on an execution against the husband, or husband and wife, and a deed given to the purchaser therefor, it is a cloud upon the title, and a court of equity will remove it. (*Riley vs. Phel*, 23 Cal. 71.)

§ 531. **When Sale May Be Enjoined.**—

A sale by a sheriff, of real estate, upon an execution against the grantor, will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of

the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale. (*England vs. Lewis*, 25 Cal. 338.)

§ 532. **Insolvency — Exemptions.** — In those states in which an insolvency law is in effect, statutory provision is usually made therein for the setting apart, for the use and benefit of the insolvent debtor, of all such property, both real and personal, as is by law exempt from execution, including a homestead. Neither the receiver nor the assignee has any right to possession of any of the exempt property. (See also *Sec. 521, ante.*)

California. Secs. 60, 6, 17 *Insolvent Act of 1880.*

Nevada. Sec. 3850 *General Statutes, 1885.*

Washington. Sec. 2761 *I Hill's Codes, 1891.*

CHAPTER XVI.

REDEMPTION FROM EXECUTION SALE.

- § 533. The Power and Duties of the Sheriff.
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- § 559. Various Decisions in Redemption Cases.
- § 560. Statutory and Equitable Right of Redemption.
- § 561. Subsequent Judgment Lien.
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§ 533. **The Powers and Duties of the Sheriff** in relation to redemption are purely statutory, and his acts are nugatory unless the provisions of the statute are strictly pursued. Who may redeem, and how redemption may be effected, if allowed at all, are matters as to which we must look to the statute in each particular state.

§ 534. **In What Cases Allowed.**—When real estate or any interest therein is sold at execution sale, redemption by the judgment debtor or by any of the interested persons known as “redemptioners” is allowed within a certain statutory period, usually either six months or a year, unless the estate sold be less than a leasehold interest of less than two years' unexpired term, in which case the sale is absolute.

Arizona. *Laws of 1889, p. 43, Sec. 20.*

California. *Secs. 700, 702 Code Civil Procedure.*

Colorado. *Secs. 1851-55 General Statutes, 1883.*

Idaho. *Secs. 4490, 4492 Revised Statutes, 1887.*

Montana. *Secs. 340, 342 Code Civil Procedure.*

Nevada. *Secs. 231, 233 Code Civil Procedure.*

Oregon. *Secs. 299, 301-3 I Hill's Codes, 1892.*

Utah. *Secs. 583, 585 Code Civil Procedure.*

Washington. *Secs. 511, 513 4 II Hill's Codes, 1891.*

§ 535. **Who May Redeem.**—Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons, or their successors in interest:—

"1. The judgment debtor, or his successor in interest, in the whole or any part of the property.

"2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this Section are termed redemptioners." (*California. Sec. 701 Code Civil Procedure.*)

Arizona. Laws of 1889, p. 43, Sec. 20.

Colorado. Secs. 2547 & Mills' Ann. Statutes, 1891.

Idaho. Sec. 4491 Revised Statutes, 1887.

Montana. Sec. 341 Code Civil Procedure.

Nevada. Sec. 232 Code Civil Procedure.

Oregon. Sec. 300 I Hill's Codes, 1892.

Utah. Sec. 584 Code Civil Procedure.

Washington. Sec. 572 II Hill's Codes, 1891.

§ 536. **Though Defendant Has Conveyed. He May Redeem.** A defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under execution. Sec. 701 of the (California) Code of Civil Procedure provides in terms that property sold subject to redemption may be redeemed by the judgment debtor or his successor in interest in the whole, or any part of the property. The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor, as such, may redeem—not that he may redeem only in the event that he has no successor in interest in the property sold under execution. The court holds that there is no good reason why the statute, which is remedial in its character, should receive a narrow construction, in order to defeat the right of redemption which it in-

tended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and a variety of other cases might readily be imagined, in which the judgment debtor, even though he had sold the property, would still have an interest in effecting a redemption from the execution sale." (*Yoakum vs. Bower*, 51 Cal. 539.)

§ 537. **Who Cannot Redeem.**—Where a mortgagor filed a homestead subsequent to a second mortgage, and both mortgages were foreclosed, the first mortgage and part of the second being paid, and judgment for the deficiency due the second mortgagee being docketed, it was held, in *Hershey vs. Dennis*, 53 Cal. 77, that the lien of the docketed deficiency was superseded by the homestead, and that the second mortgagee could not redeem from the purchaser at the mortgage sale.

§ 538. **Redemption Where Tenants in Common.**—Where land sold under judgment is embraced in one sale, a redemptioner having a lien upon a share or part of the land sold can only redeem by paying the whole of the purchase money and redeeming the whole of the land; and in such case he succeeds to the whole interest of the purchaser. Accordingly, where land was sold under a judgment of foreclosure against tenants in common, and redeemed by a judgment creditor of one of the tenants, who in due course received his deed (as in the case of *Eldridge vs. Wright*, 55 Cal. 531), it was held that the redemptioner took the interests of both tenants. Mr. Justice Thornton delivered the opinion of the court in this case. Mr. Justice Sharpstein, concurring in the judgment, doubted

whether the redemptioner had a right to redeem a greater interest in the property sold than that of his judgment debtor; but was of the opinion, as the purchaser did not object to his redeeming the whole property, that the effect of the transaction was to vest in him the whole interest of the purchaser. Mr. Justice Myrick, dissenting, was of opinion that the redemptioner was subrogated to the rights of his judgment debtor, and thus became the owner of the legal title formerly held by him; and, as to the other tenant, that he acquired an equitable lien upon his interest as security for one-half of the redemption money.

A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Subsequently, A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. The time of statutory redemption having expired, B gets a sheriff's deed: *Held*, that D, as subsequent mortgagee, may redeem A's, but not C's, interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. (*Kirkham vs. Dupont*, 14 Cal. 563.)

Redemption from execution sale by one tenant in common, after foreclosure of mortgage executed by both, restores the parties to their original title. (*Calkins vs. Steinbach*, 66 Cal. 117.)

§ 539. Time of and Payment in Redemption.

Section 702 of the California Code of Civil Procedure, provides that the judgment debtor, or redemptioner, may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase, with two

per cent per month therein in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest."

In Idaho, Nevada, Montana and Utah the time of redemption is the same; in Washington it is one year, while in Oregon it is limited to four months after confirmation of the sale. In Colorado the debtor has six months and redemptioners nine months. Compare:

Arizona. *Laws of 1889, p. 43, Secs. 21, 22.*

Colorado. *Secs. 2547-8 Mills' Ann. Stats., 1891.*

Idaho. *Sec. 4492 Revised Statutes, 1887.*

Montana. *Sec. 342 Code Civil Procedure.*

Nevada. *Sec. 233 Code Civil Procedure.*

Oregon. *Sec. 303 I Hill's Codes, 1892.*

Utah. *Sec. 585 Code Civil Procedure.*

Washington. *Sec. 513 II Hill's Codes, 1891.*

§ 540. **Judgment Debtor Need Produce No Certificate.**—It is not necessary for the judgment debtor, in effecting a redemption, to produce a certificate or other credential required by statute to be produced in case of redemption by a judgment or mortgage creditor. Those provisions do not apply to the judgment debtor. (*Yoakum vs. Bower, 51 Cal. 539.*)

§ 541. **What Redemption Must Produce.**—Besides giving the statutory notice and making the payments required, the redemptioner must establish his right to redeem, and for this purpose must, under

the California practice, "produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:—

"1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeem on a mortgage or other lien, a note of the record thereof, certified by the recorder.

"2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.

"3. An affidavit by himself or his agent, showing the amount then actually due on the lien." (*California. Sec. 705 Code Civil Procedure.*)

When the redemption is attempted to be effected through the sheriff, he has no authority, either to receive the redemption money from one claiming the right to redeem under a judgment, or to execute a deed to him, unless the redemptioner complies strictly with the provisions of the statute and produces a copy of the docket of the judgment under which he claims the right to redeem, or such other paper as the statute expressly requires to be produced. He should bear in mind that a transcript of a judgment is not equivalent to a copy of the docket of the judgment. Compare:

Arizona. Laws of 1889, p. 44, Sec. 24.

Colorado. Sec. 2548 Mills' Ann. Stats., 1891.

Idaho. Sec. 4495 Revised Statutes, 1887.

Montana. Sec. 345 Code Civil Procedure.

Nevada. Sec. 3258 General Statutes, 1885.

Oregon. Sec. 305 I Hill's Codes, 1892.

Utah. Sec. 588 Code Civil Procedure.

Washington. Sec. 516 II Hill's Codes, 1891.

§ 542. **Successive Redemption—Notice and Payments.**—Section 703 of the California Code of Civil Procedure provides that “if property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with four per cent thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff, and a duplicate filed with the recorder of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment or lien. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a con-

veyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by a debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale." (See also *Sec. 545, post.*)

Arizona. Laws of 1889, p. 43, Sec. 22.

Colorado. Secs. 2549, 2553, 2557 Mills' Ann. Stats., 1891.

Idaho. Sec. 4493 Revised Statutes, 1887.

Montana. Sec. 343 Code Civil Procedure.

Nevada. Sec. 3256 General Statutes, 1885.

Oregon. Sec. 302 I Hill's Codes, 1892.

Utah. Sec. 586 Code Civil Procedure.

Washington. Sec. 514 II Hill's Codes, 1891.

§ 543. **Transfer of Certificate of Sale.**—The simplest manner in which redemption may be effected is through the purchaser at sheriff's sale, by paying to

such purchaser the redemption money and receiving from him the requisite transfer, if he will recognize the right of the applicant to redeem and waive the usual formalities. But if the redemption is sought to be made through the officer who made the sale, all the requirements of the statute must be complied with to secure the redemption.

A quit claim deed from the holder of the sheriff's certificate after the time for redemption has expired is equivalent to an assignment of the same, and if the sheriff afterward execute a deed to the purchaser, the same is void as between the parties. (*Ward vs. Dougherty*, 75 Cal. 240.)

§ 544. **When Deficiency on Judgment Need Not Be Paid in Redemption.**—During the time for redemption, the legal title is in the mortgagor, and may be conveyed by him, and the grantee becomes entitled to redeem, without paying to the mortgagee the unsatisfied portion of the judgment under which the property was sold to him, and the judgment for the deficiency is not a lien on the land.

Where, upon a foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and docket a judgment for the deficiency, the purchaser from the mortgagor of the land, pending the time for redemption, is entitled as successor in interest to redeem from the mortgagee, without paying the amount of the deficiency. The former rule, that when real estate which is subject to a judgment lien is sold on an execution on the judgment, to the judgment creditor, for a sum less than the whole amount of the judgment, the judgment creditor continues to be "a creditor having a lien" for the unsatisfied portion of

the judgment upon the property sold under the execution, and that neither the judgment debtor nor a redemptioner with a subsequent lien could redeem without paying said judgment, has been changed by the Code of Civil Procedure. (*Simpson vs. Castle*, 52 Cal. 645.)

A judgment docketed for a deficiency, after the sale of the mortgaged premises under a judgment of foreclosure, is not a lien upon the premises sold, if they are purchased by any person other than the mortgage debtor. (*Black vs. Gerichten*, 58 Cal. 56.)

§ 545. **Judgment Debtor Not Compelled to Pay Prior Liens.**—In the case of *Sharp vs. Miller*, 47 Cal. 82, the court held that the judgment debtor is not obliged to pay other liens which the purchaser may have on the property. The code makes a distinction between a redemption by the judgment debtor and by a creditor holding a lien on the property. Under Sec. 702 Code of Civil Procedure of California, "the judgment debtor or redemptioner may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase," etc. The same section further provides that "if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made," he must also pay the amount of such lien. Sec. 701 defines a redemptioner to be "a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold." The judgment debtor is not a "redemptioner" in the sense in which that term is employed in Sec. 702 C. C. P.

But if a "redemptioner," or, in other words, a credi-

itor, holding a subsequent lien on the property, redeems, he must also pay to the purchaser any liens he may have prior to that of the redemptioner other than that for which the property was sold. The reason for the distinction made between the judgment debtor and a redemptioner is that, if the latter were permitted to redeem without paying the prior lien held by the purchaser, the title would pass to the redemptioner and the lien of the purchaser would be defeated. But if the judgment debtor redeem, he is restored to his estate, and the lien held by the purchaser will be available.

§ 546. **Partnership Judgment.**—Under Sec. 702 of the Code of Civil Procedure of California (*Sec. 539, ante*), a judgment debtor whose lands have been sold under execution may redeem the same from the purchaser without paying a prior judgment against him, held by a partnership of which the purchaser is a member. (*Campbell vs. Oaks, 68 Cal. 222.*)

§ 547. **Redemption of Real Estate of a Decedent.**—Sec. 1505 of the Code of Civil Procedure of California provides that “a judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.”

§ 548. **Redemption of Franchise.**—A corporation may, at any time within one year after execution sale, redeem its franchise, by paying, or tendering to the purchaser thereof, the sum paid therefor with ten

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per cent interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof revert and belong to the corporation, as if no such sale had been made. (*California. Sec. 392 Civil Code.*)

§ 549. **Payments in Redemption—to Whom Made.**—The payments for redemption of the property sold may be made to the purchaser or prior redemptioner, or for him to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency.

§ 549a. **Tender Equivalent to Payment.**—A proper tender of the full amount due on redemption of real property extinguishes the purchaser's lien, and is equivalent to payment. (*Hershey vs. Dennis, 53 Cal. 77.*)

§ 550. **What Money Sheriff May Receive in Redemption.**—The sheriff is the special agent of the purchaser of land, authorized to receive the redemption money for him, and, as such, may receive in redemption any lawful money, unless the judgment under which the sale was made was rendered payable in a particular kind of money. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks. (*People ex rel. Mulford vs. Mayhew, 26 Cal. 655.*)

§ 551. **Redemption in Treasury Notes.**—It is held, in the case of *The People ex rel. Mulford vs.*

Mayhew, 26 Cal. 656, that the obligation of a judgment creditor or redemptioner to pay a certain amount of money in order to exercise the statutory right of redemption from a sale of land made by a sheriff, is a debt within the meaning of the Act of Congress, making treasury notes lawful money and a legal tender in payment of debts. Land sold at sheriff's sale under a judgment payable generally in money, without specifying a particular kind of money, may be redeemed with treasury notes.

§ 552. **Withdrawing Redemption Money Defeats Redemption.**—If the judgment debtor, whose land has been sold on the judgment, deposits with the sheriff, before the time for redemption expires, money sufficient to redeem it from the sale, and the sheriff, after the time for redemption expires, executes and delivers to the purchaser a deed, the judgment debtor, if he would claim the benefit of the redemption, must not withdraw the money from the sheriff, for by withdrawing the money he ratifies the act of the sheriff in delivering the deed. (*Wilkins vs. Wilson*, 51 Cal. 212.)

§ 553. **Payment under Protest.**—When a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. (*McMillan vs. Vischer*, 14 Cal. 232.)

§ 554. **Possession Pending Time for Redemption.**—A purchaser at sheriff's sale does not acquire title, but only a lien, until after the period limited for redemption. The California statute allowing a redemption of real property sold at judicial sales, and al-

lowing the purchaser to collect the rents of the property, plainly contemplates that the possession shall not change to the purchaser until the expiration of the time prescribed as a limit to the redemption. Section 564 Code Civil Procedure provides that a receiver may be appointed in certain contingencies. Section 706, Code Civil Procedure, gives the court power to restrain the commission of waste on the property, and provides that "it shall not be deemed waste for the person in possession of the property at the time of the sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used." These provisions most clearly contemplate an adverse possession to the purchaser until the time has expired for redemption. In Arizona, Idaho, Montana, Nevada and Utah the statute is substantially the same as in California, while in Oregon and Washington the purchaser is entitled to take possession from the date of the sale, or to collect the rents in case the property be in possession of a tenant with an unexpired term.

Arizona. *Laws of 1889, p. 45, Secs. 25, 26.*

Idaho. *Secs. 4496 7 Revised Statutes, 1887.*

Montana. *Sec. 346 Code Civil Procedure.*

Nevada. *Sec. 3260 General Statutes, 1885.*

Oregon. *Sec. 307 I Hill's Codes, 1892.*

Utah. *Secs. 589, 590 Code Civil Procedure.*

Washington. *Sec. 519 II Hill's Codes, 1891.*

§ 555. **Rents and Profits before Redemption.**

—Under the practice in California and Nevada, "the purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from

the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amount of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor." (*California. Sec. 707 Code Civil Procedure.*) See also *Secs. 554, ante; 556 7, post.*

Arizona. Laws of 1889, p. 45, Sec. 25.

Nevada. Sec. 3260 General Statutes, 1885.

Oregon. Sec. 307 I Hill's Codes, 1892.

Washington. Sec. 519 II Hill's Codes, 1891.

§ 556. **Rents Pending Redemption—Decisions.**—Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser under the mortgage sale can require the tenant

to pay the rent over again to him. After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. (*McDevitt vs. Sullivan*, 8 Cal. 593.)

A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease when he purchased. (*Reynolds vs. Lathrop*, 7 Cal. 43.) The sale operates as an assignment of the lease for the time.

The purchaser at sheriff's sale of a "water ditch" is entitled to the rents and profits thereof from the date of the sale until the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant, and where a judgment debtor remains in possession of a "water ditch" after sheriff's sale, and collects the rents and profits during the six months following, he is a trustee of the fund for the purchaser at the sale, and if the fund be in danger of loss, a bill in equity to account will lie. (*Harris vs. Reynolds*, 13 Cal. 515.)

A judgment debtor who redeemed his property within twenty-one days after the sheriff's sale, but who had received from his tenants in possession \$445, rent between the day of sale and the redemption, held liable to the purchaser at the sale for the amount so received. (17 Cal. 596. Also cited as authority in *Walls vs. Walker*, 37 Cal. 432; and see *Knight vs. Truett*, 18 Cal. 113; *Raun vs. Reynolds*, Id. 289; *Hill vs. Taylor*, 22 Cal. 191; *Henry vs. Everts*, 30 Cal. 425; *Webster vs. Cook*, 38 Cal. 425; *Page vs. Rogers*, 31 Cal. 294.)

§ 557. **Rents—Attachment Will Not Lie.**—

While the statute gives to the purchaser the right to receive the rents of the property sold, pending the time for redemption, he cannot enforce such right by writ of attachment against the tenant's property. In the case of *Walker vs. McCusker*, 65 Cal. 360, the court say:—

“This action was brought to recover of the defendant, as tenant in possession of real estate purchased by plaintiff on decree of foreclosure and sale, the sum of \$1,200, value of the use and occupation from the day of sale to the making of the deed. The plaintiff sued out a writ of attachment by which property was attached; the defendant moved that the attachment be dissolved; the court below denied the motion, and the appeal from the order of denial is before us.

“Sec. 707 Code Civil Procedure declares that the purchaser, from the time of sale, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation.

“The liability of the tenant in possession to the purchaser, for rents or use and occupation from the day of sale to the expiration of the time for redemption, is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract expressed or implied within the meaning of Sec. 537 Code Civil Procedure, authorizing the issuance of an attachment.”

§ 558. **Rights of Creditors.**—After the execution of a mortgage upon real estate, a judgment was rendered against the mortgagor, which became a lien upon the mortgaged property; the mortgagee then foreclosed the mortgage, making the mortgagor alone a party defendant, had the property sold under the decree, became

the purchaser, and obtained a sheriff's deed; afterwards, the judgment creditor procured an execution upon his judgment, and had the property advertised for sale; the holder of the title under the sheriff's deed filed a bill in equity to enjoin the sale: *Held*, that he was not entitled to an injunction, and that the judgment creditor had a right to sell any interest in the land held by the judgment debtor at the rendition of the judgment or levy of the execution. *Held*, further, that the judgment creditor's equitable right of redemption not having been cut off by the foreclosure, he might, during the two years that his judgment was a lien upon the premises, sell under an execution, and purchase the legal title of the mortgagor, not only that he might assert his right of redemption at any time within the period allowed by the Statute of Limitations, but, also, that he might realize any other benefit or advantage that might accrue to him from the sale. (*Alexander vs. Greenwood*, 23 Cal. 506.)

§ 559. **Various Decisions in Redemption Cases.**—A creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. (*McMillan vs. Richards*, 9 Cal. 365.)

A subsequent mortgagee would have a right to redeem premises from a sale under a judgment upon mechanics' lien by paying the money justly due, interest, costs, etc., he not having been a party to the suit by the lien holder. (*Gamble vs. Woll*, 15 Cal. 510.)

A mortgagee of the defendant in execution, who has failed to record his mortgage until after the sale, has no lien or intervening rights as against the purchaser;

he can redeem under the statute; if he fails to do so, a court of equity will not interpose. (*Smith vs. Randall*, 6 Cal. 53.)

The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in court, and an opportunity of setting up any equities they possessed. After the decree, they stand, as to their right of redemption, in the same position as ordinary judgment debtors. (*Montgomery vs. Tutt*, 11 Cal. 317.)

The right of the mortgagor to redeem is not affected by the fact that he may have had no title to the mortgaged property, nor can the mortgagee refuse the redemption money, if tendered, because the mortgagor had no title to mortgage. (*Lorenzana vs. Camarillo*, 45 Cal. 125.)

A deed conveying land, and in express terms reserving to the grantor a lien to secure the payment of two promissory notes for a part of the price, creates an equitable mortgage upon the land. Such lien is more than a vendor's lien, and is not lost by the assignment of the promissory notes. (*Dingly vs. Bank of Ventura*, 57 Cal. 467.) Such a lien may be foreclosed as a mortgage, and there is the same right of redemption for a limited period after a foreclosure sale.

In the case of *Rumpp vs. Gerkins*, 59 Cal. 496, Leonis, a prior mortgagee, brought suit for foreclosure, obtained the usual decree, and the writ was placed in the sheriff's hands for execution. The mortgagees then executed a conveyance of the premises to Leonis, it not being intended by the latter that his security should merge in the conveyance or that his lien should be ex-

tinguished. Following, Leonis purchased the premises at the sheriff's sale. Plaintiff claiming under a junior mortgage, not affected by the prior suit, joined Leonis as defendant in an action of foreclosure, claiming the conveyance to Leonis operated a merger of his mortgage lien upon the premises. The court adjudged that the lien of Leonis was not merged, that plaintiff should redeem the property from Leonis by paying the latter the amount bid at the sheriff's sale.

§ 560. **Statutory and Equitable Right of Redemption.**—The right to redeem, under the statute, from a sale on execution, exists in some instances where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, are restricted to the six months given by statute. Parties acquiring interests pending suits to enforce previously existing liens, or after judgment docketed or sale made, have no equity, and are confined to the rights given by the statute; but parties obtaining interests subsequent to the plaintiff, and before suit brought, who are made parties in such suit, possess both the equitable and statutory right. They may redeem under the statute, or they may file their bill in equity. Where a mechanic's lien attached on certain premises January 18, 1856, and a mortgage was placed on the same premises January 21, 1856, and a suit was brought subsequent to the execution and record of the mortgage, to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months no redemption being had, a deed was executed to the assignees of the

sheriff's certificate, it was held, in *Whitney vs. Higgins*, 10 Cal. 547, that the right of the mortgagees to redeem the premises, by paying off the incumbrance of the mechanic's lien, was not affected by the decree and the proceedings thereunder, and that the purchasers of the premises, upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, were entitled to the same right to redeem.

§ 561. **Subsequent Judgment Lien.**—The payment, by a judgment debtor, of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. (*McCarty vs. Christie*, 13 Cal. 79.)

The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him, he has the same right as successor in interest to the debtor or mortgagor. (*McMillan vs. Richards*, 9 Cal. 413.)

§ 562. **Costs of Appeal in Redemption.**—Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent damages, the damages, with the costs, do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. (*McMillan vs. Vischer*, 14 Cal. 232.)

§ 563. **When Possession and Title Pass.**—The title to land sold at execution sale does not pass until the execution and delivery of the deed. The legal

estate exists in the judgment debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser. In the absence of statutory provision to the contrary, the provisions allowing a redemption of property sold at judicial sale contemplate that the possession shall not change to the purchaser until the expiration of the time limited for redemption. (*Guy vs. Middleton*, 5 Cal. 392.)

Under the Oregon and Washington codes, the purchaser is entitled to possession from the day of the sale. (*Oregon*, Sec. 307 *I Hill's Codes*, 1892. *Washington*, Sec. 519 *II Hill's Codes*, 1891.)

CHAPTER XVII.

SHERIFF'S DEEDS.

- § 564. When Deed Is Due.
- § 565. When Deed Takes Effect.
- § 566. When Sheriff's Deed Conveys.
- § 567. Recitals in Sheriff's Deed.
- § 568. Parol Evidence Not Admissible.
- § 569. Who Estopped by Recitals in Sheriff's Deed.
- § 570. Against Whom Officer's Deed Is Evidence.
- § 571. How Meaning of Deed Ascertained.
- § 572. Against Whom Officer's Deed Not Evidence.
- § 573. Premature Sheriff's Deed Void.
- § 574. When Mandamus to Sheriff Will Not Lie.
- § 575. Deed by Deputy.

§ 564. **When Deed Is Due.**—The purchaser, or his assignee, is entitled to a sheriff's deed after the expiration of the period fixed by the statute for redemption. This period varies under the statutes in different states, and in some there is no redemption, the sale being absolute in the first instance. (See Secs. 539, 476, *ante*.)

The term "months" used in the statute, fixing the period of redemption from judicial sales, means calendar and not lunar months; and a sheriff's deed executed before the expiration of the statutory period of redemption, is absolutely void, and not merely voidable. (*Gross vs. Fowler*, 21 Cal. 393.)

§ 565. **When Deed Takes Effect.**—When a judgment is rendered in an attachment suit, and becomes a lien on real property, the lien of the attachment is merged in the judgment, and the deed which follows takes effect from the date of the attachment. The judgment does not operate so as to release or obliterate the attachment lien. The property attached is still in contemplation of law in the hands of the officer, subject to the judgment. The property is sold under final process issued on the judgment, but the deed made to the purchaser at the sale, as the last of the series of acts, takes effect from the date of the levy of the attachment, as the first of the series of acts, and perfects the title of the property from the day when it was taken by the officer for the satisfaction of the judgment. In the case of *Porter vs. Pico*, 55 Cal. 174, Mr. Justice McKee, who delivered the opinion of the court, said:—

“Perhaps it would be more in accordance with the fitness of things to deal with the fact of the levy of the attachment as of an incipient execution, by which the officer has taken into his possession the subject of the levy for the satisfaction of any judgment which might be recovered, and to order him, after judgment, to sell the specific property for that purpose. Under the other practice, the levy of the attachment, upon the principle *transit in rem judicatam*, becomes merged in the judgment, and the judgment perpetuates the lien of the levy, and the sheriff's deed perfects the title which passes by the sale under the judgment and relates to the date of the levy. Upon these principles it is not necessary for the court, in order to enforce priority of lien, to make an order for the sale of the property attached, or to issue a *venditioni exponas*. The execution upon the judgment is a sufficient authority to the sheriff to sell

the real property which he has in his possession, and the deed which he makes relates back to the date of the lien perpetuated by the judgment." (See also next section.)

A sheriff's deed takes effect from the time of its actual delivery, and the execution of the deed by the sheriff, and information given by him to the grantee that the deed is ready for him, do not amount to a delivery. (*Jefferson vs. Wendt*, 51 Cal. 573.) The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser, or someone for him, in such a way as to be beyond the legal control of the grantor.

§ 566. **What Sheriff's Deed Conveys.**—The sheriff's deed on execution sale passes such title and interest as the judgment debtor had in the land at the time of the levy, and such as he acquired between the time of the levy and the sale. (*Kenyon vs. Quinn*, 41 Cal. 325; *Frink vs. Roe*, 70 Cal. 296.) When an attachment has been levied in the suit under which the sale is made, however, the deed of the sheriff also relates back to the attachment, and conveys such title as the judgment debtor had at that time. (*Porter vs. Pico*, 55 Cal. 165. And in case of any other statutory lien, for satisfaction of which the sale is made, the deed relates back to the vesting of such lien. (*Littlefield vs. Nichols*, 42 Cal. 372.) When there are no judgment or attachment or other statutory liens, the deed relates back only to the time of the levy of the execution. (*Blood vs. Light*, 38 Cal. 649.)

The sheriff's deed of an equitable title, standing in the judgment debtor, does not, by operation of law,

pass the legal title which may thereafter be acquired by him; but the debtor holds the legal title in trust for the purchaser under the sheriff's sale. (*Kenyon vs. Quinn, ante.*) See also *Sec. 565, ante.*

§ 567. **Recitals in Sheriff's Deed.**—The officer who makes a sale of land by virtue of an execution, and executes to the purchaser a deed therefor, must, in his deed, make recitals of the recovery of the judgment, the names of the judgment creditor or creditors, and of the judgment debtor or debtors, and of the issuing of an execution on the judgment, and of the levy and sale thereunder. The recital of such facts is essential to show the officer's authority and the transmission of the debtor's title in the property to the purchaser. (*Donahue vs. McNulty, 24 Cal. 411.*)

"It may be regarded as settled in California that the misrecital of the execution in an officer's deed will not affect the validity of the deed, if the officer had authority to sell." (*Wilson vs. Madison, 55 Cal. 5.*)

§ 568. **Parol Evidence Not Admissible.**—Parol testimony of the officer who makes a sale of property under an execution, and executes a deed to the purchaser therefor, is not admissible for the purpose of adding to, contradicting, or altering the terms of the deed.

Parol evidence is inadmissible to show that a constable's sale was made by virtue of any other judgment or execution than that recited in the deed; and it is also inadmissible to show that the constable sold the interest of a person in the land described in the deed, whose interest the deed itself does not recite upon its face to have been sold. (*Donahue vs. McNulty, 24 Cal. 412.*)

§ 569. **Who Estopped by Recitals in Sheriff's Deed.**—The officer executing a deed for property sold under execution, and those who claim under the deed, are estopped from denying the truth of the matters recited therein, but the same are not evidence as against strangers, or those claiming adversely to the deed. (*Donahue vs. McNulty*, 24 Cal. 411.)

§ 570. **Against Whom Officer's Deed Is Evidence.**—A deed of a constable, made of land sold under execution, is not evidence of the purchaser's title as against any person except those whom the deed shows upon its face to have been judgment debtors, and named as such in the execution issued on the judgment, and whose interest in the property was sold by the officer. (*Donahue vs. McNulty*, 24 Cal. 411.)

§ 571. **How Meaning of Deed Ascertained.**—Where the language of a deed executed by an officer for property sold under execution is plain and unambiguous, the court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words. (*Donahue vs. McNulty*, 24 Cal. 411.)

§ 572. **Against Whom Officer's Deed Not Evidence.**—Where a judgment was rendered against several persons, and the execution issued upon it against all the judgment debtors, and the constable levied upon and sold the land of one of the judgment debtors, but, in making a deed to the purchaser, did not insert the name of the one whose land had been sold as a judgment debtor, or recite that his land had been sold: *Held*, that the deed was not evidence of title in the

purchaser as against the owner of the land. (*Donahue vs. McNulty*, 24 Cal. 411.) See also *Secs. 569, 570, ante.*

§ 573. **Premature Sheriff's Deed Void.**—If a sheriff's deed be given before the time for redemption has expired, it is void. (*Gross vs. Fowler*, 21 Cal. 393.) See also *Sec. 564, ante.*

§ 574. **When Mandamus to Sheriff Will Not Lie.**—A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. (*Williams vs. Smith*, 6 Cal. 98.)

§ 575. **Deed by Deputy.**—A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. (*Lewis vs. Thompson*, 3 Cal. 267.)

CHAPTER XVIII.

FORECLOSURE.

- § 576. Sales under Foreclosure.
- § 577. Levy Not Necessary.
- § 578. Sheriff's Authority to Make Sale.
- § 579. Prompt Return after Sale.
- § 580. Time for Return Unlimited.
- § 581. Second Order of Sale.
- § 582. Order of Sale—Designation by Judgment Debtor.
- § 583. Sale of Both Real and Personal Property.
- § 584. Appeal—Stay of Proceedings.
- § 585. Title Conveyed by Foreclosure Sale.
- § 586. Removal of Improvements.
- § 587. Mortgage of Partner's Interest.
- § 588. Redemption.
- § 589. Rights of Mortgagor.
- § 590. Sale by Commissioner.

§ 576. **Sales under Foreclosure.**—The course of procedure in making sales of property under foreclosure is the same as that provided for sales under writs of execution issued against real property of the judgment debtor, the notice of sale being published and posted and the sale conducted in all respects as provided in the statute, except so far as may be provided in the decree and order of sale. (*Heyman vs. Babcock*, 30 Cal. 367.)

§ 577. **Levy Not Necessary.**—It is not necessary that a sheriff should go upon the land to make a formal levy under a decree of foreclosure and order of sale of real property. The object of a levy is to create a lien upon the land—to indicate, by some act of the officer, the particular property which he intends to sell. When, however, the judgment itself designates the property which is to be sold, as in case of foreclosure, there is no occasion for a levy. (*Southern Cal. L. Co. vs. Hotel Co.*, 94 Cal. 217.)

§ 578. **Sheriff's Authority to Make Sale.**—Under the chancery system, a certified copy of the decree of foreclosure was furnished to the officer as his authority for making the sale, and he acted under the direct mandate of the court; and such is now the proper practice where no statutory provision is made on the subject. In California, "when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." (*Sec. 684 Code Civil Procedure.*) "This 'writ' is neither styled an execution nor is it such in its nature," no levy being necessary in order to designate the property to be sold; neither is it subject to the statutory provisions as to the time of return of executions. (*Southern Cal. L. Co. vs. Hotel Co.*, 94 Cal. 217, 1892.)

The prevailing practice in California, under the section quoted, has been for the clerk to issue a writ, commonly known as the "order of sale," similar in form to an execution, referring briefly to the decree, and accompanied by a certified copy thereof, and com-

manding the sheriff to sell the property described in the decree, according to its terms and requirements. Neither the description of the property nor the amount of the judgment appears in such writ.

Since the rendition of the decision last cited (94 Cal. 217), some doubt has prevailed as to the regularity of the practice as above stated, and some attorneys have insisted that the writ, or "order of sale," issued by the clerk, shall itself contain all the material parts of the decree, no copy of the latter being sent with it to the sheriff. In that case, however, the court say that, in the code provision quoted, there is preserved the distinction between the mode of executing a common law judgment, to wit, by writ of execution, and a decree in equity; that the officer, in making the sale, is only executing the directions of the court just as, under the chancery system, the officer acted under the direct mandate of the court, his only authority being a certified copy of the decree. It is also worthy of notice that the only point decided by the court in that case was that the sale should not be set aside on the sole ground that it was made after the return day named in the writ.

Further, in deciding the case of *Tregear vs. Etiwanda Water Co.*, 76 Cal. 537 (1888), the same court had said: "The practice of the courts in this State in directing the sale of encumbered property under foreclosure proceedings has not been uniform. . . . Under Sec. 684 Code Civil Procedure, a writ reciting the judgment, or the material part thereof, and directing the officer to execute the judgment, by making the sale, etc., is the proper course. By analogy to the former equity practice, this writ is usually termed an order of sale. Plaintiff so calls it in his complaint, and, as we think, properly."

The case of *Heyman vs. Babcock*, 30 Cal. 367 (1866), involved a foreclosure sale in 1856, when the statute provided that where the judgment requires the performance of any act other than the payment of money, a certified copy of the judgment may be served upon the officer, and his obedience thereto enforced. (*Sec. 213 Practice Act.*) In that case the court say that the general rule that process is the proper authority of the sheriff applies to foreclosure cases; that when no express provision is made either by law or in the decree prescribing the mode of making sale, "the sheriff acts under and by virtue of an order of sale issued upon the decree;" that this practice "has been too long adopted and too uniformly acquiesced in to be now changed by the court on the ground that it was not fully authorized by that act."

It would seem, therefore, that, considering these cases, either with reference only to the points actually decided, or giving full effect to the *obiter dicta*, they are not only not in conflict with the prevailing practice as hereinbefore outlined, but would appear to sustain it. In whichever form the writ or decree comes to the hands of the officer, however, he should execute its mandates if it comes under seal of the court and properly attested.

§ 579. **Prompt Return after Sale.**—The sheriff should make his return as soon as the sale, delivery and filing of the certificate of sale are accomplished, to enable the plaintiff to have docketed any deficiency that may exist against the judgment debtor. The plaintiff, in most cases, is entitled to an execution for the deficiency, and if the judgment debtor has other property that may be levied upon, the plaintiff may expect such

promptness on the part of the officer as will enable him to secure the remainder of his judgment, if it can be made. Any undue delay in making the return may entail loss upon the plaintiff, for which the sheriff would be responsible.

§ 580. **Time for Return Unlimited.**—When the statute provides that a judgment for the sale of specific property, as in cases of foreclosure, may be enforced by a “writ reciting such judgment” (*Sec. 684 Code Civil Procedure, Cal.*), such “writ” is not an “execution” which must be enforced and returned within the statutory time. (*Southern Cal. Lumber Co. vs. Ocean Beach Hotel Co.*, 94 Cal. 217.)

§ 581. **Second Order of Sale.**—A second order of sale may issue, if the first order of sale be not executed. Such second order might in some cases be ground of objection on the score of costs, but it is not objectionable as affecting the validity of the sale. (*Shores vs. Scott River Water Co.*, 17 Cal. 626.)

§ 582. **Order of Sale—Designation of Property by Debtor.**—A statute providing that the judgment debtor may direct the order in which property, personal or real, shall be sold, and that the sheriff shall follow his directions, is applicable to a foreclosure sale, when the decree is silent as to such order. A sale not so conducted is not void, but merely voidable, and on timely motion the court should ordinarily set it aside. (*Marston vs. White*, 91 Cal. 37.)

The well-established rules in equity proceedings require in foreclosure cases, not only that the property should be sold in parcels, but that the property included

in the first mortgage should be exhausted before recourse is had to the second. (*Raun vs. Reynolds*, 11 Cal. 14.) See also *Secs. 453-5, ante*.

In the absence of any statutory provision as to the manner of making sale under foreclosure, the court has jurisdiction to provide in the decree that the property be sold either in one or in several parcels, and the officer making the sale is bound to follow such directions. (*Hopkins vs. Wiard*, 72 Cal. 259.)

§ 583. **Sale of Both Real and Personal Property.**—When a mortgage covers both real and personal property, both may be sold under decree of foreclosure and transferred by the sheriff's deed, if no redemption be made. (*Tregear vs. Etiwanda Water Co.*, 76 Cal. 537.)

§ 584. **Appeal—Stay of Proceedings.**—Under the California practice (*Sec. 945 Code Civil Procedure*) when a decree of foreclosure provides for a deficiency judgment, execution cannot be stayed unless the undertaking on appeal provide for the payment of the deficiency. (*Spence vs. Kowalsky*, 95 Cal. 152.)

§ 585. **Title Conveyed by Foreclosure Sale.**—When a mortgage conveys the estate in fee, the title of a purchaser at a foreclosure sale relates back to the date of the mortgage, and he acquires all the estate vested in the mortgagor at that time and also that which he may have subsequently acquired. (*Barnard vs. Wilson*, 74 Cal. 512.) See also *Sec. 566, ante*.

The deed of the sheriff passes fixtures subsequently annexed by the mortgagor. (*Sands vs. Pfeiffer*, 10 Cal. 259.)

§ 586. **Removal of Improvements.**—The severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man.

A house on a mortgaged lot in Sacramento was carried by the flood in 1862 into the street, a short distance from the lot. The owner made a contract with one Lowell to sell him the house, and Lowell was about to remove it, when the mortgagee brought an action to foreclose the mortgage and to restrain the removal. At the trial, the court rendered a judgment against the owner of the lot for the amount due on the note; and a decree for the foreclosure of the mortgage and for the sale of the mortgaged property, excepting the house, and as to that it was ordered that the decree should not affect nor authorize its sale. The judgment was affirmed on appeal, and it was held that the severance and removal of the house withdrew the house from the operation of the mortgage lien, and that after the removal the mortgagor or his assignee had a right to sell the house, and the purchaser to convert it to his own use. (*Buckout vs. Swift*, 27 Cal. 434.)

§ 587. **Mortgage of Partner's Interest.**—If two or more persons are partners in the ownership and management of real estate, and owe partnership debts, and one of the partners mortgages his interest in the property to secure his individual debt, the mortgagee acquires only the mortgagor's interest in the surplus after the payment of the partnership debts; and if these equal or exceed the value of the property, and it is afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, holds

no interest in the property, liable in equity to be sold, and the mortgage cannot be foreclosed. (*Jones vs. Parsons*, 25 Cal. 100.)

§ 588. **Redemption.**—After foreclosure sale, redemption may be made in the same manner and by the same persons as in case of sales under writ of execution, which subject is treated in this work in the chapter on "Redemptions," *Sec. 533, ante.* (*McMillan vs. Richards*, 9 Cal. 365; *Calkins vs. Steinbach*, 66 Cal. 117.)

§ 589. **Rights of Mortgagor.**—A mortgagor, after a sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property of its fixtures. (See also *Secs. 554-5, ante.*)

§ 590. **Sale by Commissioner.**—Under the practice in California since 1893, the court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the incumbered property. If such commissioner be appointed, he shall sell it in the manner provided by law for the sale of like property by the sheriff upon execution, and the provisions of Chapter 1, Title 9, Part II, of the Code of Civil Procedure (relating to execution sales), are made applicable to sales made by such commissioners, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioners. (*Sec. 726 C. C. P.*) "The commissioner, before entering upon his duties, must be sworn to perform them faith-

fully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law. Within thirty days after such sale, the commissioner must file with the clerk of the court in which the action is pending, a verified report and account of the sale, together with the proper affidavits, showing that the regular and required notice of the time and place of the sale was given, which report and account shall have the same force and effect as the sheriff's return in sales under execution. In all cases of sales made by a commissioner, the court in which the proceedings are pending shall fix a reasonable compensation for the commissioner's services, but in no case to exceed the sum of ten dollars." (*Sec. 729 C. C. P.*)

CHAPTER XIX.

FRAUDULENT TRANSFERS.

- § 591. Fraudulent Transfers, Generally.
- § 592. Code Provisions in California.
- § 593. Statutory Provisions in Other States.
- § 594. General Principles—Leading Cases.
- § 595. Nature of the Transfer Required.
- § 596. Change of Possession a Question of Fact.
- § 597. Remedy of the Creditor.
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- § 599. Subsequent Employment of Vendor.
- § 600. Sale of Property in Vendee's Possession.
- § 601. Property in Hands of Third Party.
- § 602. Transfer of Cumbersome Personal Property.
- § 603. Transfer of Lodging House Furniture.
- § 604. Transfer of Undivided Interest.
- § 605. Personal Property on Land Conveyed.
- § 606. Cattle, Hogs, etc., on a Ranch.
- § 607. Purchasers in Good Faith.

§ 591. **Fraudulent Transfers, Generally.**—One of the most difficult obstacles encountered by officers in holding property belonging to the judgment debtor in executions, arises from the facility with which transfers may be made of personal property. As if in contemplation of fraudulent intention on the part of vendors who are or are about to become insolvent, the law has often hedged such sales around with strongly

expressed provisions in favor of the creditor who is in pursuit of his claim. Not only are transfers declared to be void which are proven to be fraudulent, but the burden of proving fraud is in some cases by statute not only removed from the creditor, but transfers, under certain circumstances, are to be conclusively presumed to be fraudulent. (See *Secs. 592-3, post.*)

Where the presumption prevails to such extent, an inquiry into the consideration paid or the good faith of the transaction is immaterial. (*Woods vs. Bugbey*, 29 Cal. 467; *Brown vs. O'Neal*, 95 Cal. 262.)

§ 592. **Code Provisions in California.**—By the terms of Sec. 3440 of the Civil Code:—

“Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer.”

All transfers of personal property, founded in actual fraud, are also declared to be void as against creditors. (*Sec. 3439 Civil Code.*)

In this State the statute stands upon the extremest

rule of caution and promptitude. The statute makes certain facts conclusive evidence of fraud, and whatever may or may not be the actual intention of the parties, if the actual facts exist which are contemplated by the law, the sale is void. The language of the statute is exceedingly strong, and the intention manifest. The change of possession from the vendor to the vendee must not only be actual but also continued. The object of the statute being the prevention of fraudulent sales of goods, no means more simple and efficient could have been adopted to have accomplished the end intended, than that requiring this actual and continued change of possession. It takes away from the parties the means of carrying out their fraudulent intent, and removes the temptation. As the fraudulent vendor cannot remain in possession, under any pretense whatever, he is compelled to trust entirely to the fidelity of the fraudulent vendee.

§ 593. **Statutory Provisions in Other States.**

-In Arizona, Colorado and Nevada, the statutes are substantially the same as in California, requiring actual and continued change of possession, in Arizona, however, the presumption of fraud being only *prima facie* and not conclusive. In these states, and also in Oregon, all conveyances of property, either personal or real, made with actual intent to defraud creditors, are declared to be void. In the State last named all transfers of property, made in trust for the person making the same, are void against creditors.

Arizona. Secs. 2034, 2031-2 *Revised Statutes*, 1887.

Colorado. Secs. 1523, 1526 *General Statutes*, 1883.

Nevada. Secs. 2633, 2638 *General Statutes*, 1885.

Oregon. Sec. 3059 *Hill's Codes*, 1892.

§ 594. **General Principles—Leading Cases.**—

There are numerous instances of record in which courts have been called upon to make a practical application of the principle that a vendee of personal property must assume at once all external *indicia* of title, in order to protect himself against the creditors of the vendor. The leading case in California is that of *Stevens vs. Irwin*, 15 Cal. 503. In that case the Court said:—

“The word ‘actual’ was designed to exclude the idea of a mere formal change of possession, and the word ‘continued’ to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, ‘continued change of possession,’ as to require that the vendor should *never* have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results.

“The ‘continued change of possession,’ then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A *raisonable* construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the *actual* possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal

but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the *status* of the property and the claims to it by the vendee."

This case has been cited and quoted with approval in a long line of cases from 19 Cal. 334, to 98 Cal. 454. In *Godchaux vs. Mulford*, 26 Cal. 323 (see also this section, *post*) the Court say that in *Stevens vs. Irwin*, for the first time in this State, the true and rational exposition of the rule was given. (See also *Sec. 595, post*.)

In *Godchaux vs. Mulford*, 26 Cal. 316, another leading case, the court said: "A hired clerk or salesman is no more in possession of the goods of his employer than a hired laborer is in possession of the farm on which he is employed at work. The employment of the vendor in a subordinate capacity is colorable only and not conclusive upon the question as to whether there has been an immediate delivery and an actual change of the possession. He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the owner, and another has acquired and openly occupied that position, that he has ceased to be the principal in the change and management of the concern, and become only a subordinate, or clerk, the reason of the rule announced in the statute is satisfied." This case has been cited on this point with approval in 29 Cal. 472, 60 Cal. 544, 67 Cal. 285, 73 Cal. 402; and in *O'Gara vs. Lowry*, 5 W. C. Rep. 417 (1885), the above language was quoted with approval. (See also *Sec. 599, post*.)

§ 595. **Nature of the Transfer Required.**—The actual change of possession of personal property, required by the statute, is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased. “Then, if the possession of the property by the vendors had not wholly ceased when it was attached, it was liable to the attachments, notwithstanding, as between the vendors and vendee, the sale was complete and the title to the property had become vested in the plaintiff as the purchaser.” (*Cahoon vs. Marshall*, 25 Cal. 201; see also *Sec. 605, post.*) This case was also cited with approval in 67 Cal. 285, 73 Cal. 402, 84 Cal. 171, and 91 Cal. 295. (See also *Sec. 594, ante.*)

Under a statute requiring “an immediate delivery” of personal property sold, any delivery that is sufficient to pass the title as between the parties is sufficient. The further requirement of an “actual and continued change of possession” (*Sec. 3440 Code Civil Procedure, Cal.*) is intended to exclude mere formal and temporary change of possession, but not to require that the vendor should never have any control over them. (*Porter vs. Bucher*, 98 Cal. 454.)

§ 596. **Change of Possession a Question of Fact.**—The question as to whether the sale of personal property is accompanied by an immediate delivery thereof and followed by an actual and continued change of possession, is a question of fact for the jury. (*Meads, Seaman & Co. vs. Lasar*, 92 Cal. 221.)

Every case of this kind “has its own particular features, and must be determined on the particular facts which surround the given transaction or transfer.” (*Byrnes vs. Moore*, 93 Cal. 393.)

§ 597. **Remedy of the Creditor.**—In case of an attempted transfer of personal property without such change of possession as is required by the statute, any creditor of the vendor “may cause the property to be seized in the same manner as he might have done had there been no attempted transfer.” (*Watson vs. Rodgers*, 53 Cal. 401; *Brown vs. O’Neal*, 95 Cal. 262.)

§ 598. **Resumption of Possession.**—In case of a transfer of a mare and a header by father to son, the court quoted from 13 Vt. 284 with approval, as follows: “After a sale of personal chattels has become perfected by such a visible, notorious and continued change of possession that the creditors of the vendor may be presumed to have notice of it, the vendee may lend or let, or employ the vendor to sell, or perform any other service about the thing, with the same safety he may a stranger.” (*Gould vs. Huntley*, 73 Cal. 402.) See also *Sec. 594, ante*.

§ 599. **Subsequent Employment of Vendor.**—The employment of the vendor by the vendee after the sale is not conclusive evidence of fraud, but is an element of such proof. (*Godchaux vs. Mulford*, 26 Cal. 316; *Sec. 594, ante*.)

In the case of *Weil vs. Paul*, 22 Cal. 493, one Strauss, a clothing merchant, whose goods were under attachment, sold them to Weil, who procured the release of the attachment, and removed the stock to his (Weil’s) cigar store. Within less than two weeks thereafter Strauss was engaged professedly as employe of Weil in peddling out the goods and managing their sale at retail, in which condition they were again attached as the property of Strauss: *Held*, that there

was no such actual and continued change of possession as was required by the fifteenth section of the Statute of Frauds, and that the goods were therefore liable to the attachment.

§ 600. **Sale of Property in Vendee's Possession.**—In case of a sale of horses already in the possession of the vendee, followed by an immediate removal to another ranch owned by him, the court held that "the delivery and possession were as complete as the nature of the case permitted." (*Hogan vs. Cowell*, 73 Cal. 211.)

§ 601. **Property in Hands of Third Party.**—If a vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods consents to retain the goods for him, and does so retain them, it is a sufficient delivery and change of possession to satisfy the requirements of the statute. (*Williams vs. Lerch*, 56 Cal. 330.)

§ 602. **Transfer of Cumbrous Personal Property.**—What acts will amount to an immediate and an actual and continued change of possession of personal property of a cumbrous and ponderous nature must depend in a great degree upon the circumstances of the particular case; but care should be taken in such cases to keep in view the object of the statute, and to exact nothing less than a substantial observance of its salutary provisions.

The purchaser or mortgagee of a kiln of bricks, while being burned, must take that possession of the property which places him in the relation to the same

that owners usually have to a like kind of property, in order to secure it against attaching creditors of the vendor. If the owner of the kiln, before the burning of the same has been completed, makes a sale thereof in good faith, and for a valid consideration, to a creditor, and the vendor completes the burning of the kiln, exercising the same apparent control as before, the sale is to be deemed fraudulent as to an attaching creditor for want of a change of possession. (*Woods vs. Bugbey*, 29 Cal. 466; cited with approval in 71 Cal. 221.)

§ 603. **Transfer of Lodging House Furniture.**—A lodging house keeper sold all the furniture for a full consideration to a person who assumed immediate possession; the vendor notified the lodgers at once, but did not leave the house for five days, owing to sickness; the transfer was held good as against a writ against the vendor, levied just after she left the house. (*Ross vs. Sedgwick*, 69 Cal. 247.)

§ 604. **Transfer of Undivided Interest.**—In a case involving the sale of an undivided interest in a horse, it was held that where one co-owner of personal property, who is in sole possession, sells his interest to a third party, there must be an immediate delivery; but that the other co-owner might sell his interest without the necessity of a change of possession. (*Brown vs. O'Neal*, 95 Cal. 262.)

§ 605. **Personal Property on Land Conveyed.**—In *Bunting vs. Saltz*, 84 Cal. 168, a case involving the transfer of personal property located upon land, the title to which was also attempted to be transferred, the following instruction to the jury was held to be proper:

“The possession which the law requires the vendee to have, after a transfer to him of personal property, is not sufficient if it amounts simply to constructive possession, or the mere possession which the law attaches to the ownership of the land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title then or thereafter, the mere transfer of ownership to the land is not sufficient to constitute a change of possession of the personal property sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it.”

In the same case the court quotes with approval from *Cahoon vs. Marshall*, 25 Cal. 197, as follows: “The possession by the plaintiff of the farm upon which the personal property was when it was purchased by her, provided it was an actual and exclusive possession, would be strong evidence of the like possession of such personal property. . . . If the actual and exclusive possession of the farm would be strong evidence of his like possession of the personal property, then the possession of the farm by the vendor, or the concurrent possession of it by the vendor and vendee, would at least tend very strongly to show that the plaintiff had not that actual possession of the personal property necessary to place it beyond the reach of the creditors of the vendor.”

§ 606. **Cattle, Hogs, etc., on a Ranch.**—In a case involving the transfer of an undivided interest in a band of cattle on an extensive range, certain acts of the vendee—riding over the range and looking after them—were held sufficient to justify the verdict of a jury holding the transfer to be valid. (*Hart vs. Mead*, 84 Cal. 244.)

A sale of hogs, allowed to remain upon a ranch in charge of the same persons as before the sale, does not satisfy the California statute, although such persons were requested to take charge for the buyer and consented to do so. (*Mosgrove vs. Harris*, 94 Cal. 162.)

§ 607. **Purchasers in Good Faith.**—"The purchaser or incumbrancer in good faith," who is protected by the statute against fraudulent transfers, must be one who not only acquired without notice of the infirmity of his vendor's title, but must have parted with value. (*Brown vs. Reed*, 77 Cal. 544.)

CHAPTER XX.

FIXTURES.

- § 608. Fixtures, Generally.
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- § 610. General Rule in California.
- § 611. Intention to Govern, Generally.
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- § 613. Engines, Boilers and Machinery.
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- § 615. Building—When Removable.
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- § 617. Renewal of Lease.
- § 618. Mortgagee of Lessee.
- § 619. Fixtures on Public Lands.
- § 620. When Fixtures Become Personal Property.
- § 621. How to Levy upon Fixtures on Realty.
- § 622. Leading Case Quoted.

§ 608. **Fixtures, Generally.**—The question often arises as to whether property is, in contemplation of law, “personal” in nature, or whether it has become part of the realty upon which it has been placed. Upon the determination of this question will depend, not only the legal status of such property, as “real” or “personal,” but its ownership; and both these points become material in the consideration of it as the subject of legal process. The question—as to when property, primarily personal, becomes a part of the realty and cannot

be removed—arises in two widely different classes of cases, *i. e.*, between vendor and vendee as to the right of the former to retain, and between owner and lessee as to the right of the latter to remove such property from the realty.

Upon few subjects have there been more numerous or more diverse decisions by the courts. Though no great difficulty appears at first sight in the definition itself, yet the application to particular facts has vexed the courts and given rise to an endless conflict of decisions. Kent defines a fixture to be “an article of a personal nature affixed to the freehold.” It has been held that by the expression “annexed to the freehold” is meant, fastened to or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation.

The author of “Smith’s Leading Cases” says: “The general rule appears to be that, where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on a trade, it is considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance.” Again: “The general rule governing this subject is that the tenant, if he have annexed anything to the freehold during his term, cannot again remove it without the consent of his landlord.”

As between the landlord, who is the owner of the freehold, and the tenant, the general rule is that, during his term, the tenant may remove fixtures erected or placed by himself, things erected for the personal convenience of the tenant, which are personal in their nature, such as a cider mill, to be used during tenancy. But if he suffers them to remain fixed after his tenancy

expires, and he quits the possession of the land, he cannot enter to remove them.

The rule as to fixtures is construed most strongly in favor of the vendee in case of a sale, and in favor of the tenant in case of a lease. "The general rule of law is that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed, as between landlord and tenant, in relation to the things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee. As a general thing, a tenant may remove what he has added, when he can do so without injury to the estate, unless it has become, by its manner of addition, an integral part of the original premises; but as against a vendor, all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, unless specially reserved in the conveyance." (*Field, J., in Sands vs. Pfeiffer, 10 Cal. 258.*)

§ 609. **California Code Definitions.**—In that portion of the Civil Code of California relating to the "Nature of Property" (Div. 2, Part I, Title 1) it is provided that real property consists not only of land, but that which is either affixed to, incidental or appurtenant to land, or immovable by law (*Sec. 658*), and that "a thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or

screws." (*Sec. 660.*) Fixtures attached to mines are declared by Sec. 661 of the Civil Code to be: "Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills and all other machinery or tools used in working or developing a mine."

§ 610. **General Rule in California.**—Whatever the owner of real property has annexed to it for the more convenient use and improvement of the premises, passes by his deed, but whatever chattels a tenant has annexed to or placed upon the land for the purposes of trade, manufacture, agriculture and domestic convenience, may be removed by him, with an exception in case it cannot be removed without practically destroying it, or where it has become essential to that to which it has been attached. (*Fratt vs. Whittier*, 58 Cal. 130, 131; *Hendy vs. Dinkerhoff*, 57 Cal. 6.)

§ 611. **Intention to Govern, Generally.**—In order to determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used. (*Lavenson vs. Standard Soap Co.*, 80 Cal. 250; 2 Kent, 13 Ed. 343.)

§ 612. **Limitation of the Rule.**—While the intention of the annexation will govern, as a general rule, this must be limited where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy, and it has become so absorbed or merged into the realty that its identity as personal property is lost, as when the property could not be removed without prac-

tically destroying it, or where it or part of it is essential to the support of that to which it is attached. (*Hendy vs. Dinkerhoff*, 57 Cal. 6.)

§ 613. **Engines, Boilers and Machinery.**—The rule in reference to fixtures is applied with different degrees of strictness as between different parties. Engines, boilers, machinery and the like, which could properly be removed by the tenant, as between him and his landlord, might, if placed there by the owner of the land, be considered a part of the realty and pass by conveyance of the same, as between vendor and vendee. (*McGreary vs. Osborne*, 9 Cal. 119; *Fratt vs. Whittier*, 58 Cal. 130.) An engine resting upon and fastened by bolts and nuts to timbers which are imbedded in the soil, is a part of the realty, so as to pass by deed of the same; also a steam boiler secured by trestlework imbedded in the soil and resting on and surrounded by mason work of stone and mortar built on the ground. (*McKiernan vs. Hesse*, 51 Cal. 594.) In the same case, it was held that such property passed, although placed by third parties upon the land while owned by the United States.

“The engines and boilers, etc., used in a flour mill, being permanently fastened to the mill, which had its foundation in the ground: *Held*, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage, and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure.” (*Sands vs. Pfeiffer*, 10 Cal. 258; *Field, J.*)

A tenant who puts up machinery for a mill, in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but, as between

vendor and vendee, such machinery would be considered as a part of the realty. (*McGreary vs. Osborne*, 9 Cal. 119.)

A steam engine and boiler, fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. Such machinery, when applied to quartz leads, is a *trade fixture*, removable by the tenant, if otherwise entitled to remove it. But this removal can only be during the tenancy, and during such further period of possession by the tenant as he holds *the premises under a right to still consider himself a tenant*, and not during the time he may actually hold possession after his lease has expired. Such machinery, so fixed, is included by the phrase in the lease, "improvements that may be put up on the ground for working the lead." And where the lease stipulated that the improvements shall go to the lessor on termination of the lease, if the rent was not paid, or if the lessee declined to purchase, as per the lease he might, the lessor's right to the fixtures is not destroyed by the tenant contracting, subsequently, to buy, and taking a bond for title on payment of the purchase money, but failing to fulfill his bond. (*Merritt vs. Judd*, 14 Cal. 60.)

An engine, boiler and machinery for a flouring mill, erected by a lessee on the demised premises, and securely attached thereto by bolts and screws, are fixtures as between him and his attaching creditors, notwithstanding an agreement between the lessor and lessee that the latter should be at liberty to remove the machinery upon the expiration of the lease. The severance and removal of the fixtures by the lessee converts

them into personalty. (*McNally vs. Connolly*, 70 Cal. 3.)

§ 614. **Buildings—Question of Fact.**—A “building,” without other qualification or term of description, is essentially personal property, and the mere erection of it upon land does not necessarily make it a fixture. The question is one of fact, to be determined upon the evidence in each particular case. (*Miller vs. Waddingham*, 91 Cal. 377; *Dietz vs. M. Transfer Co.*, 95 Cal. 92.) A building set upon blocks resting on the ground is personal property, and replevin lies to recover it. (*Pennybecker vs. McDougal*, 48 Cal. 160.)

D purchased a lot of land at sheriff’s sale on execution, and entered into possession and erected certain buildings thereon. On the twenty-fifth day of May, 1858, D removed the buildings. On the same day the buildings were removed, the defendants in execution sold the premises to T, and a day or two after T redeemed the lot from the sale, and then brought suit against D to recover the value of the buildings: *Held*, that, as there was no evidence that the buildings were attached to the soil, T cannot recover. (*Tyler vs. Decker*, 10 Cal. 436.)

In the absence of any agreement to the contrary, a dwelling-house and barn erected upon the land of his landlord by a tenant becomes a part of the realty. A lessee, before the expiration of his term, erected a house and barn on the leased premises. At the expiration of the term, a new lease was taken of the premises, without reserving the rights of the lessee to the buildings so erected: *Held*, that the buildings become fixtures annexed to the land, and that the lessee had no right to remove them. (*Marks vs. Ryan*, 63 Cal. 107.)

§ 615. **Building—When Removable.**—A building erected on leased ground for a lumber office and sleeping place for employes in a lumber yard, and which rests upon short posts on top of sills laid upon the ground, constitute trade fixtures, removable by the tenant. (*Security L. and T. Co. vs. Willamette S. M. L. and M. Co.*, 99 Cal. 636.)

§ 616. **Omission in Lease No Estoppel.**—“A party who has placed improvements and fixtures upon land which he has leased upon condition that he should have the right to remove them, cannot be estopped from taking them away, even though he may have inadvertently signed a lease with no such conditions therein. In the case of *Isenhoot vs. Chamberlain*, plaintiff and defendant entered into an agreement for the lease of land upon certain conditions named in the lease, and the further condition that, on or before the expiration of the lease, defendant should have the right to remove from the land certain fixtures and improvements previously placed there by him. During negotiations for the lease, plaintiff at all times admitted that defendant was the owner of the improvements and fixtures, and entitled to remove them, and that the right of removal should be a condition of the lease. The lease was reduced to writing by the procurement of the plaintiff (lessor), and when read to defendant (lessee) he refused to sign the same unless such condition was added to the lease. But, upon being informed by the plaintiff that he (plaintiff) knew the fixtures and improvements belonged to defendant, and that the omission of the conditions from the lease would make no difference, and that defendant should have the right of removal, the defendant accepted the assurance of

plaintiff, and, relying thereon, and believing in the good faith of plaintiff, was induced to, and did, execute the lease, omitting the condition: *Held*, plaintiff was estopped from claiming the improvements and fixtures, and that defendant, having commenced to remove the same previous to the expiration of the lease, would not be restrained by injunction; and that defendant was entitled to have the lease reformed. (*Isenhoot vs. Chamberlain*, 59 Cal. 630.)

§ 617. **Renewal of Lease.**—When a lessee has placed upon land improvements which would pass as between vendor and vendee, his right to remove them is terminated by taking a new lease without reserving his right to the improvements. (*Merritt vs. Judd*, 14 Cal. 60; *Mark vs. Ryan*, 63 Cal. 107.)

§ 618. **Mortgagee of Lessee.**—Although a lessor of land cannot, in a given case, claim the fixtures, it is otherwise of the mortgagee of the lessee. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. (*Merritt vs. Judd*, 14 Cal. 60.)

§ 619. **Fixtures on Public Lands.**—A fixture is an article of a personal nature annexed to the freehold, and may exist on public land. Although placed there by third parties, it passes to the purchaser who acquires title from the government. (*Merritt vs. Judd*, 14 Cal. 60; *McKiernan vs. Hesse*, 51 Cal. 594.)

§ 620. **When Fixtures Become Personal Property.**—By the wrongful severance from the premises,

the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains the sheriff's deed. (*Sands vs. Pfeiffer*, 10 Cal. 259; *McNally vs. Connolly*, 70 Cal. 6.)

§ 621. **How to Levy upon Fixtures on Realty.**

—Where the attachment or execution is to be levied upon steam boilers, engines, pumps or other articles that have been attached to the realty so as to become a part thereof, the levy should be made as upon realty. It is the interest of the defendant in the land which is to be attached. And where such fixtures are, from their nature or exposed condition, liable to clandestine removal, or injury through malice or otherwise, the officer will be justified by consent of the plaintiff in putting a keeper in charge thereof to take care of the property so that he may have it intact at the time of sale. If the plaintiff decline to incur the expense of a keeper, he cannot complain of laxity on the part of the officer, if the property is lost or injured through lack of care on his part.

§ 622. **Leading Case Quoted.**—The leading case in California upon this subject is that of *Fratt vs. Whittier*, cited *ante* (Sec. 610); and as the court, in its opinion, discussed the question with great thoroughness, both as affecting vendor and vendee, and also landlord and tenant, a large portion of the decision is here given.

"This is an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., a kitchen range with boiler attached, a patent water filter, tanks and window screens. The property was attached to a building known as the

Orleans Hotel, situate on a lot of land fronting on Second Street, in the city of Sacramento. As owner of the hotel, the plaintiff, on Oct. 15, 1879, contracted in writing to sell the same to the defendant, by the following description, viz.: 'Lot No. 6, in the square between J and K and Front and Second Streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging.'

"The sale was made for \$28,000, gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the 1st of November, 1879, reserving to the plaintiff, among other things, the right within ten days after delivery of possession, to remove from the upper rooms of the hotel his 'furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed.' On the 25th of October the defendants, having satisfied themselves about the plaintiff's title, paid the full amount of the purchase money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract of sale and subject to the terms, conditions and reservations therein contained. Within ten days after the delivery of possession, plaintiff demanded of the defendants the privilege of removing the articles in controversy from the hotel, which being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by deed of grant.

"If the question arose out of the deed alone, it

might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the authorities upon the subject are conflicting." . . .

"What is accessory to real estate is, according to the rule of the common law, part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture and domestic convenience; and courts recognize and enforce the right of removal by a tenant, of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation does not apply as between heir and executor, vendor and vendee. As between the latter, the rule of the common law is still applicable, except so far as it may be modified by statutory regulations on the subject; so that chattels attached to the freehold by the owner, contributing to its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey. (*Tourtellot vs. Phelps*, 4 Gray 378.) And after conveyance, they cannot be severed by the vendor or anyone else than the owner.

"As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed, and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles, appertaining to a building for manufacturing ashes (*Miller vs. Plumb*,

6 Cowen 665; *S. C. 16 Am. Dec. 456*); a cotton gin fixed in its place (*Bratton vs. Claussen, 2 Strob. 478*); a steam engine to drive a bark mill (*Oves vs. Oglesby, 7 Watts, 106*); kettles set in brick in dyeing and print works (*Dispatch Line vs. Bellaney Man. Co., 12 N. H. 207*); iron stoves fixed to the brick work of chimneys (*Goddard vs. Chase, 7 Mass. 432*); wainscot work, fixed and dormant tables, engines and boilers used in a flour mill and attached to it (*Sands vs. Pfeiffer, 10 Cal. 259*); a steam engine and boiler fastened to a frame of timber and bedded in a quartz ledge and used for the purpose of working the ledge (*Merritt vs. Judd, 14 Cal. 50*); a conduit or water pipe to conduct water to a house (*Philbrick vs. Ewing, 97 Mass. 134*); hay poles in use on a hop farm (*Bishop vs. Bishop, 11 N. Y. 123*); statues erected for ornament, though only kept in place by their own weight (*Snedeker vs. Warring, 12 N. Y. 170*). In fact, whatever the vendor has annexed to a building for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that, when the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purpose for which the building is used, will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. (*Green vs. Phillips, 26 Gratt. 752; Shelton vs. Ficklin, 32 Id. 755.*)

“Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their

nature, the circumstances under which they were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that the globes were lettered 'Orleans Hotel,' and that they, with the chandeliers, etc., were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste pipe which ran through the wall of the building, and connected with a sewer in the alley outside, and the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main, or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito transoms and window screens were fitted to the windows and transoms of the hotel—each window and transom frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were necessary to the hotel, as its windows, its blinds and shutters. All of the articles were, therefore, essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, 'it would not have been a hotel without them.' They were, therefore, fixtures which passed by the deed of grant to the defendants, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions and reservations therein contained and expressed.

"As already stated, the agreement reserved only the furniture, pictures and carpets of the upper rooms of the building, and none of the 'permanent fixtures or appurtenances to the property.' In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel, which were to pass by the deed; it is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement, courts will enforce it. (*Smith vs. Waggoner*, 50 Wisc. 155; *Hunt vs. Bay State Iron Co.*, 97 Mass. 279; *Ford vs. Cobb*, 20 N. Y. 344; *Tifft vs. Horton*, 53 Id. 377; *Ford vs. Williams*, 24 N. Y. 359; *Smith vs. Benson*, 1 Hill, 176; *Menagh vs. Whitwell*, 52 N. Y. 146.)

"So the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them by any possibility of construction could fall within the reservation of 'furniture, carpets, or fixtures in the upper rooms of the hotel.' The plaintiff, therefore, sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants." (*Fratt vs. Whittier*, 58 Cal. 126.)

CHAPTER XXI.

SUITS AGAINST SHERIFFS.

- § 623. Limitation of Actions against Officers.
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- § 654. Release of Sheriff by Stipulation.
- § 655. Offices of Sheriff and Tax Collector Separate.
- § 656. Principal and Deputy—Levy of Separate Writs.

§ 623. **Limitation of Actions against Officers.**

—Under the practice in California an action cannot be commenced after two years against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. (*Sec. 339 Code Civil Procedure.*) An action cannot be commenced after the lapse of one year, against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. (*Sec. 340 Code Civil Procedure.*) An action cannot be maintained, unless commenced within six months, against an officer, or officer *de facto*, to recover any goods, wares, merchandise or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure. (*Sec. 341 Code Civil Procedure.*)

Compare:

Arizona. *Sec. 2316 Revised Statutes, 1887.*

Nevada. *Sec. 3644 General Statutes, 1885.*

Oregon. *Secs. 7, 9 I Hill's Codes, 1892.*

Washington. *Sec. 115 II Hill's Codes, 1891.*

§ 624. **Same Limitations as to Sureties.**—It is also held that it was not the intention to allow a longer period for commencing an action against a sheriff and his sureties “for a liability incurred by doing an act in his official capacity,” than is allowed for commencing an action against him alone for it. (*Paige vs. Carroll*, 61 Cal. 211.)

§ 625. **When Statute Commences to Run.**—In an action, brought against a public officer for money alleged to have been received by him in his official capacity but for which he failed to account, the statute of limitations commences upon the default of the officer to pay over the money according to law, and not from the time of the demand made for it. (*People ex rel. Dunn vs. Melone*, 73 Cal. 574.)

The statute of limitations for breach of an official bond does not commence running until the expiration of the official term. (*People vs. Van Ness*, 79 Cal. 84.)

When a sheriff is *ex officio* tax collector, the statute prescribing limitation of actions against a sheriff does not apply to an action upon his bond as tax collector. (*People vs. Burkhardt*, 76 Cal. 606.)

The Supreme Court of Colorado (*In re People to Use of Fritch vs. Cramer et al.*, *Pacific Reporter*, Vol. 25, p. 302) decides that the liability of sheriffs for the omission of any official duty, except for escapes, accrues when the alleged consequential injury was suffered, and not when the alleged non-feasance occurred.

§ 626. **Illegal Levy.**—If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. He has become a trespasser, as against the rights of the owner of the

property. The statute allows him to try the rights of property or the protection of an indemnity bond. The procedure in such cases has been pointed out elsewhere in this volume. If he cannot safely hold the property, he is entitled to indemnity from the plaintiff. If the sheriff take property not belonging to the defendant in the writ, whether in his possession or not, the taking is tortuous.

§ 627. **When Previous Demand Not Necessary.**—If the original possession of property is acquired by a tort, no demand previous to the institution of a suit is necessary. (*Sargent vs. Sturm*, 23 Cal. 359, affirmed in *Wellman vs. English*, 38 Cal. 584. See also *Boulware vs. Craddock* 30 Cal. 190, which overrules all cases subsequent to and in conflict with *Ledley vs. Hays*, 1 Cal. 160, on this point.) In the case of *Paige vs. O'Neal*, 12 Cal. 483, the court say:

"It was not essential to aver a demand of the defendant of the wheat in controversy in the complaint, or to prove a demand on the trial. If the property in fact belonged to the plaintiff—and it is upon this theory the suit is brought, and to this effect the evidence tended when the plaintiff rested—the seizure by the defendant was tortuous; and it is a general rule that where the possession of property is originally acquired by a tort, no demand previous to the institution of a suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required."

In the case of *Woodworth vs. Knowlton*, 22 Cal. 169, the court say: "The evidence and pleadings show clearly that the plaintiff was the owner of the property, and in possession at the time of the levy of the attach-

ment, and we see nothing in the evidence showing a right of possession in any person other than the plaintiff at the time of the commencement of the suit. The attachment gave the defendant no authority to take the property owned by the plaintiff, and his seizure of the property was therefore wrongful and unlawful. If any demand whatever was necessary in this case, which is not very clear, it was sufficient to make that demand of the party in actual possession, and who was able to comply with it, and it would have been but an idle ceremony to make the demand of Atherton or Griffin, who could not have complied with it had they been willing to do so."

If a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit. (*Boulware vs. Craddock*, 30 Cal. 190.) The sheriff having misapplied his process, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance, that the property may have been in the possession of the execution debtor at the date of the seizure, amounts to nothing except upon proof of fraud or commixture. In the case above cited, the court say: "The rule of the common law is correctly stated in *Ledley vs. Hays*, 1 Cal. 160, and the correctness of that decision is impliedly recognized in *Daumiel vs. Gorham*, 6 Cal. 44. The statement of facts in *Taylor vs. Seymour*, 6 Cal. 512, is imperfect; but if that case is to be understood as laying down a different rule, then we prefer to follow *Ledley vs. Hays*."

§ 628. **When Demand Necessary.**—In the case of *Kelley vs. Scannell*, 12 Cal. 73, the Supreme Court held that notice of claim and demand for the property was necessary on the part of the claimant. This was an action to recover the possession or the value of certain personal property, comprising the furniture, fixtures and stock of the "Empire State Saloon." The property was, on the 19th of February, 1857, seized by the defendant as sheriff of San Francisco County, under an attachment against one Wilson. Prior to the seizure of the property by the defendant, the plaintiff, by an instrument in writing, bargained and sold the property to Wilson, and, by the terms of the agreement, the property was to be delivered and paid for on the 14th of February, 1857. On that day Wilson paid a part of the purchase money, and the time for the payment of the balance was extended to February 24. On the 14th of February, Wilson and one Kirk were in possession of the property, and appear to have been the proprietors of the saloon. This possession continued up to the time of the seizure of the property by the defendant as sheriff. The plaintiff's complaint contains no allegation, nor was there any proof on his part, of notice of his claim or demand of the property, prior to the bringing of this action. Plaintiff had judgment in the 4th District Court, and the Supreme Court granted a new trial, holding that "defendant having seized the property by virtue of his office and process, while in the possession of the party defendant mentioned in the writ, was entitled to notice and demand from plaintiff before he can be held liable to an action for the possession or value."

Where, at the time of the levy of a second execution (the first having been quashed), the goods first levied

upon had passed by sale to a third party, and were mixed with other goods subsequently purchased, which last goods were alleged to be liable to the execution, it was held, in the case of *Wellington vs. Sedgwick*, 12 Cal. 470, that if they were so mixed or confounded with other goods as that they could not be identified or distinguished, and Wellington failed to point out to the sheriff or designate the goods which were not subject to execution, the sheriff could not be liable for levying on the whole. But the sheriff would be bound, after the levy, on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of, and designating, the particular goods improperly seized, and must be given previously to suit brought.

§ 629. **Justification for Seizure.**—An officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint.

The general denial only puts in issue the allegations of the complaint. New matter must be specially pleaded, and new matter is that which the defendant must affirmatively establish. (*Glazer vs. Clift*, 10 Cal. 304.)

Where, in an action against the sheriff for taking goods, he justifies under an attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attach-

ment issued therein, held to be sufficient. (*Towdy vs. Ellis*, 22 Cal. 651.)

When property is taken from the possession of the defendant by the officer levying thereon, it is sufficient to introduce (in suit against the sheriff), in evidence, the attachment or execution under which the levy is made; but when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment, or prove the debt for which judgment is demanded in the attachment suit. (*Sexey vs. Adkinson*, 34 Cal. 346.)

If an officer seizes the property of the debtor, and the writ be regular on its face, it is a sufficient justification to him; for the defendant may, if the attachment has been improvidently issued, move to have it quashed or bring a suit upon the undertaking; but a third party, a stranger to the record, could not interfere, and, therefore, it would seem but justice, before any right could be established against him, by reason of a proceeding to which he was not a party, that its regularity should be shown. An officer who seizes property in the hands of the debtor, may justify under the execution or process; but when he takes property from a third person, who claims to be the owner thereof, he must show the judgment and execution; if an attachment, the writ of attachment and the proceedings on which it was based.

In the case of *Norcross vs. Nunan*, sheriff (61 Cal. 640), which was an action for the recovery of personal property or its value, and for damages for its detention, the court below refused to admit the writ of attachment in evidence. On appeal Mr. Justice Myrick delivered the following opinion of the court:—

“This was an action for the recovery of personal

property or its value, and for damages for its detention. But the plaintiff did not claim the delivery of the property to him before judgment. The defendant, sheriff, justified under a writ of attachment and an execution.

"1. Conceding that the court below was correct in refusing to admit the writ of attachment in evidence because of the defect of the affidavit, in stating that the amount claimed was due upon either an express or implied contract, yet the defendant was entitled to have the execution in evidence upon which to base the defense that the transfer of the property from Gordon & Cory to plaintiff was fraudulent and void as to creditors. We think the evidence of the plaintiff clearly shows that the transfer was void as to creditors. (*Sec. 3440 Civil Code.*) The sheriff did not take the property from the possession of plaintiff; and even if there were irregularities in the proceedings for the judgment, such irregularities would not prevent the officer from justifying under an execution valid on its face. There is nothing on the face of the execution to show its invalidity. The rule is fully stated in *Freeman on Executions*, Sec. 101.

"The sheriff may limit his inquiries to an inspection of the writ. If the writ is issued by the proper officer, in due form, and appears to proceed from a court competent to exercise jurisdiction over the subject matter of the suit, to grant the relief granted and enforce it by the writ issued, and there is nothing on the face of the writ showing a want of jurisdiction over the person of the defendant, or showing the writ to be clearly illegal from some other cause, the officer may safely proceed. That from some cause not shown in the writ, the judgment or writ was irregular or void, will be of no consequence to him. He can justify upon producing the

writ. It is therefore immaterial to him that the judgment does not correspond to the writ or that there ever was any such judgment in existence.'

"Judgment and order reversed and cause remanded for a new trial."

A sheriff makes out a *prima-facie* case of justification of the seizure of property under a writ of attachment, by the production of the writ and affidavit on which it was issued, notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure, if the property was in possession of the defendant and attached as his property. (*Babe vs. Coyne*, 53 Cal. 261.)

§ 630. **Duress of Goods.**—The issuance of an attachment and levy of the same on goods, if there be a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized. (*Kohler vs. Wells, Fargo & Co.*, 26 Cal. 606.) Proof of injury to plaintiff's business as a criterion of damages is inadmissible.

§ 631. **Liability of Officer and Sureties for Trespass.**—Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. (*Van Pelt vs. Littler*, 14 Cal. 194.) An action on the official bond of an officer lies primarily upon the breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not—the result of the non-feasance or mis-feasance of the officer. In the decision here cited the suit was brought upon the official bond of a constable, against the officer and his sureties, to recover damages for an illegal seizure of

the property of the plaintiff, under an execution against other parties. It was contended that the suit was improperly brought upon the official bond of the constable; that the sureties are not liable on the bond in the first instance, and that the only remedy primarily is an action of trespass against the officer alone. The condition of the bond being that the officer shall well and faithfully discharge the duties of his office, it was held that there could be nothing in that point. The bond is a contract by which the officer and his sureties, in effect, covenant and agree, not only that the officer will faithfully perform the duties enjoined by law, but that he will not, by virtue or under color of his office, commit any illegal or improper act. It is no answer to an action upon the official bond of an officer, that the party complaining has not chosen to pursue some other equally available and proper remedy.

The law is well settled that a sheriff is answerable for the wrongful acts of his deputy, committed under color of his office, and in the pretended discharge of his duty. If the deputy levy an execution against A upon the property of B, the sheriff is liable; and he is liable not only in a private and individual capacity, but in his public and official character, and upon his official bond. This liability rests alone upon the ground of the official relation existing between the parties, and can be enforced only as to such acts of the deputy as are connected with the performance of his official duty. He is no more answerable for a naked trespass committed by the deputy than any other person, but the wrongful acts of the deputy, done under color of process, are deemed official, and for such acts he is liable. This being admitted, and its correctness seems never to have been questioned,

it is difficult to perceive any satisfactory reason why similar acts of the sheriff himself should not be held of the same character, in order to charge his sureties. Our statute makes no distinction between the liability of a sheriff and a constable. The Legislature intended that the officer and his sureties should be responsible for every abuse of his official powers, and there could not well be a more flagrant abuse of such powers than the seizing and selling of the property of one person under and by virtue of an execution against another. He does not act in such a case in a private and individual capacity, but as an officer, clothed with official authority, and protected by the judgment of a court and the process which he intends to execute. No resistance can lawfully be made by any person whose property is thus taken. The property itself may be detained whether legally taken or not, and a summary mode is provided for the protection of the officer, to determine disputes in regard to the title. "To hold that such an act is not official," say the court in the case above cited, "at least so far as to charge the sureties, it appears to us, would be in contravention of the spirit and intention of the statute, and would certainly operate most unjustly upon persons whose property may be taken by an officer who is insolvent and unable to respond in damages for its value."

In a suit brought on the official bond of defendant, Webster, who was sheriff of San Joaquin County, against Webster and his sureties, to recover damages for the levy by Webster on property of one Pico, which levy was made under color of process, it was held (*Pico vs. Webster*, 14 Cal. 203) that, where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety.

But, in the case of official bonds, the sureties undertake in general terms that the principal will perform his official duties; and a judgment against the officer, in a suit to which they were not parties, is not evidence against them.

§ 632. **Measure of Damages for Detaining Personal Property.**—In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property, with interest. If circumstances of aggravation be shown in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions. In such actions the rule of damages depends on the presence or absence of circumstances of aggravation in the trespass, as fraud, malice or oppression. In the absence of such circumstances, the rule is compensation merely, and this refers solely to the injury done to the property, and not to collateral or consequential damages resulting to the owner. And the measure of relief is matter of law. But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages.

The rule of compensation merely, as distinguished from the rule of exemplary damages, applies, even though the writ under which the officer committed the trespass was void—there being no circumstances of aggravation. (*Dorsey vs. Manlove*, 14 Cal. 553.)

In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. (*Phelps vs. Owens*, 11 Cal. 25.)

The rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law, acting under color of process, as to private persons. In a suit against a sheriff and the plaintiff in a judgment, for a wrongful seizure of property on an execution upon such judgment, the sheriff who acted without improper motives cannot be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff cannot be given in evidence in aggravation of damages against the sheriff. (*Nightingale vs. Scannell*, 18 Cal. 315.)

In the case of *Selden vs. Cashman*, 20 Cal. 67, action for damages for trespass, for the seizure of a stock of goods under an execution issued upon a void judgment, the court held that the fact of the invalidity of the judgment was not sufficient to warrant the conclusion that the seizure was malicious. There was nothing extraordinary attending the seizure, and the course ordinarily adopted in such cases seems to have been substantially pursued. The seizure was undoubtedly a hardship upon the plaintiff, but there was no evidence of any wrongful design or willful misconduct tending to aggravate the offense. The case presented was that of a simple trespass, and the court below acted properly in refusing to allow exemplary damages.

To maintain *trover* or *trespass de bonis asportatis*, evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain either action. It was held, accordingly, in *Rider vs. Edgar*, 54 Cal. 127, in an action by a mortgagee of personal property against a sheriff, for taking the same under attachments against the mortgagor, that a levy upon a part of the property in the possession of the mortgagor, and the appointment of a keeper, was a *taking*, although the property was not moved or otherwise disturbed, and though it was released before any demand from the plaintiff.

In an action for trespass (*Pacheco vs. Hunsacker*, 14 Cal. 120), brought by one Pacheco against Hunsacker, as sheriff, for seizing and taking away certain grain, the property of plaintiff, the defendant admitted the seizure, averring that it was done by virtue of a writ of attachment issued at the suit of *Dutil vs. Andeque*; that he sold the undivided two-thirds interest in the wheat, as perishable property, for \$495; that, at the time of the seizure, Andeque had a leviable interest in the wheat, and that Dutil was a *bona-fide* creditor. The wheat was in five stacks, and was left by the sheriff in charge of a keeper until the day of sale. At the sale the sheriff announced that he only sold the undivided two-thirds interest of Andeque. Pacheco was present and notified the sheriff that, if he sold, he, Pacheco, would abandon his one-third and claim of the sheriff the whole value. The purchaser at the sale afterwards went onto the land, threshed out the whole of the five stacks, and kept the wheat. The sheriff retained the \$495, to abide the event of this suit. A few days before the seizure by

the sheriff, Andeque sold to Pacheco these five stacks, pointing them out specifically, executed a bill of sale, left the ranch, and did not return.

The court below, among other things, instructed the jury that the plaintiff was entitled to recover, if at all, the value of all the grain taken. The jury found for plaintiff \$1,457. Judgment was rendered accordingly, and defendant appealed. The Supreme Court held that the plaintiff was entitled to the value of all the grain taken.

In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. (*Coghill vs. Boring*, 15 Cal. 213.) The rule is, where the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of conversion. When the value is fluctuating, the plaintiff may recover the highest market value at the time of the conversion, or at any time afterwards. (*Hamer vs. Hathaway*, 33 Cal. 117.)

An officer holding goods under a writ of attachment is liable on his bond for any damage thereto occurring through his carelessness or negligence. (*Wilkowski vs. Hern*, 82 Cal. 604.)

In an action to recover damages from a sheriff for a wrongful seizure of plaintiff's goods under writs of attachment issued in suits against his son, where, on motion of the plaintiff made in such actions, the attached property has been restored by order of the court to him, exemplary damages, attorney's fees and other expenses attending the hearing of such motion, should not be awarded, in the absence of any showing of fraud,

malice or oppression. (*Adams vs. Gillam*, 36 *Pacific Reporter* 51, *Kansas*.)

§ 633. **Seizure of Mortgaged Personal Property—Damages.**—Under a statute requiring the officer to pay or tender the amount of the mortgaged debt before he can levy upon mortgaged personal property, if the officer sells and converts such property without such tender, the mortgagee is entitled to recover of the officer the amount of the mortgage debt with interest. (*Sherman vs. Finch*, 71 *Cal.* 68.)

§ 634. **When Replevin Will Not Lie.**—When an officer has sold personal property under execution, and parted with possession of it, the action of claim and delivery will not lie against him. (*Riciotto vs. Clement*, 94 *Cal.* 105.)

§ 635. **When Judgments Cannot Be Set Off.**—A sheriff will not be allowed to take advantage of his own wrong, and by an illegal act defeat the purpose of the statute. In the case of *Beckman vs. Manlove*, 18 *Cal.* 389, plaintiff recovered judgment against defendant for seizing, as sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the judgment on which the execution issued, and moved the court to set off this latter judgment against the former: *Held*, that the motion was properly denied; that defendant, being sued as a wrongdoer, the judgment of plaintiff for the value of the property must, as between plaintiff and defendant, be regarded as standing in place of the property; and that if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the exemption law.

§ 636. **Joinder of Sureties.**—The sureties on the bond of a sheriff may properly be joined as parties defendant in an action against him to recover personal property wrongfully taken on execution, and for damages for its detention. (*Sam Yuen vs. McMann*, 99 Cal. 497.)

§ 637. **Liability of Sheriff's Sureties.**—Sureties on the sheriff's official bond in this State are entitled to stand upon the precise terms of their contract, by which they stipulate for his official, not his personal, dealings. In the case of *Schloss vs. White*, sheriff, 16 Cal. 68, suit brought on a sheriff's bond against the officer and his sureties, the plaintiff sued out attachment against one Kalkmann, and had it levied on some goods. Other creditors issued similar process, also levied on the same goods; and afterwards the plaintiff dismissed his proceeding, and claimed that the goods levied on, or a part of them, were his own property, they having been procured by Kalkmann by false pretenses. The plaintiff sued the sheriff in replevin. He did not take the goods out of the sheriff's possession, but came to an arrangement with the sheriff, whereby the sheriff agreed to sell the goods and keep the proceeds to answer the judgment, if the plaintiff obtained one in his replevin suit. The sheriff sold the goods and paid the money into court, saying nothing about this arrangement; and the money was paid, under the order of the court, on the claim of the other creditors. The court held as follows: "The sureties of the sheriff had nothing to do with and gave no sanction to this arrangement. The question is, Are they bound to the plaintiff for the goods or the money received from the sale—the plaintiff having obtained judgment in the replevin

suit? We think they are not. It was no part of the sheriff's duty to make this agreement with the plaintiff to sell the goods and to hold the proceeds for the plaintiff in a certain event. He had no legal authority, as sheriff, to sell these goods and to hold the money on bailment for the plaintiff. If the plaintiff trusted him with the custody of the goods, and gave him authority to sell them, he became, so far, the agent of the plaintiff, and the plaintiff must look to him merely as his agent; he cannot hold the sureties bound for executory contracts of this sort, entered into without their consent. If so, there would be scarcely a limit to their responsibility; for contracts of this sort might run for years, and represent every variety of complication. If the sheriff had retained the goods, he might have obtained a bond of indemnity from the other creditors; or if the plaintiff had given bond, he might have relieved the sheriff from the custody of the goods. But here the sheriff assumes by this agency, a responsibility for himself and his sureties, greater in degree and different in kind from that imposed by law, and it would be unjust and impolitic to encourage such dealings by holding sureties responsible for them."

Where the obligors in a sheriff's bond, bind themselves, jointly and severally, in specific sums designated, they may all be joined in the same action, but separate judgments are required. (*People vs. Edwards*, 9 Cal. 286.)

The sureties of a sheriff are not liable for any statutory penalty imposed upon him for neglect of official duty. The sureties are liable only for actual damages sustained. (*Glascock vs. Ashman*, 52 Cal. 493.)

§ 638. **Sheriff's Notice to Sureties.**—It is of the greatest importance to an officer that the sureties on an indemnity bond given to him, be promptly notified of any suit brought against him by a party claiming property seized under process. Section 1055 of the Code of Civil Procedure of California provides that "if an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs."

If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff cannot afterwards have judgment entered on motion in that action against the sureties on the indemnifying bond unless he give the sureties written notice of the action brought against him. He cannot avail himself of this remedy, but is left to his action upon the indemnity bond. (*Dennis vs. Packard*, 28 Cal. 101.)

§ 639. **Defect in Sheriff's Bond—No Defense.**—The defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law.

§ 640. **Bond to Indemnify Sheriff for Unlawful Act.**—A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in violation of an order enjoining its sale, is void, because an unlawful contract. (*Buffendeau vs. Brooks*, 28 Cal. 642.) In this case the judgment had been set aside and a temporary injunction issued. The bond was dated June 16, but was not delivered to the sheriff until June 28, the day of the sale. The sheriff erroneously supposed that the bond would indemnify him for selling, notwithstanding the restraining order.

§ 641. **Agreement to Indemnify Sheriff.**—An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right; but an agreement to indemnify a party for a willful trespass about to be committed is against public policy and void. In the case of *Stark vs. Raney*, 18 Cal. 622, wherein the sheriff seized and sold a wagon on execution in favor of Raney, who pointed out the wagon, requested the sheriff to seize it, and verbally agreed to hold him harmless, etc., it was held, in a suit by the sheriff against Raney for damages recovered against the sheriff, for the seizure, that the agreement to indemnify is valid; that it was not a "special promise to answer for the debt, default or miscarriage of another," within the Statute of Frauds because the sheriff was acting not for himself, but as agent of Raney, and the promise was to be responsible for his acts as such agent. It was held, further, that the sheriff was entitled to recover, not simply the value of the property which he had been compelled to pay, but also the costs incurred by him in

defending the suit brought to recover such value; that his claim to indemnity extends to the entire damages to which he had been subjected on account of the seizure.

§ 642. **Liability of Sureties on Indemnity Bonds.**—Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. Where an indemnity bond is given to a sheriff to hold him harmless, and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. (*White vs. Fratt*, 13 Cal. 521.)

A bond was given by a plaintiff to a constable to indemnify him from liability for selling certain property claimed and actually owned by persons other than the execution debtor; and the property having been sold, and the owners having sued the constable and recovered judgment against him, the latter assigned the bond to them, and they released him from liability on the judgment: *Held* (*McBeth vs. McIntyre*, 57 Cal. 49), that the release of the constable did not operate to release the obligors on the bond. Substantially, the constable paid the judgment against him, by assigning the bond.

§ 643. **Alteration of Bond.**—In an action by a sheriff on an indemnity bond, it appeared that after its execution the bond had been altered by substituting “C. J. Hubner” for “J. M. Berry,” as the claimant of the property seized by the sheriff, and afterwards and before the trial, by erasing the former and restoring the latter name, thus restoring it to its original condition; but there was no allegation or proof that the alterations were made with a fraudulent design, or that the defendants could possibly be injured by them: *Held (Rogers vs. Shaw, 59 Cal. 260)*, that the alterations did not render the instrument void.

§ 644. **Conditions of Indemnity Bond.**—If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lot vs. Mitchell, 32 Cal. 24.*) In this case the obligors do not undertake anything except they will indemnify the sheriff from any actual damage that he may sustain by reason of any costs, suits, judgments and executions that shall come or be brought against him.

When a sheriff takes an indemnity bond against the claim of a third party, in attachment or execution, and it is provided in the bond that the officer may retain for a reasonable time, as additional security against such claim, all moneys that may come into his hands by reason of said attachment or any execution in said action, the term “reasonable time” will enable the

officer to retain such moneys until the determination of any suit that has been brought against him therein by the claimant. (*Scherr vs. Little*, 60 Cal. 614.)

§ 645. **Actions upon Indemnity Bonds.**—Instances of disastrous results from loosely drawn complaints in actions to recover upon undertakings given to prevent the levy, and for the release of attachments, are so frequent that a word or two upon that subject is deemed not out of place in this work. If the complaint does not aver either that the giving of the undertaking sued on prevented the levy of the attachment, or that the property was released upon the giving of the undertaking, it fails to aver the very gravamen and essential gist of the cause of action itself. In an action upon an undertaking given to prevent the levy of an attachment, in the case of *Coburn vs. Pearson*, 57 Cal. 306, the complaint stated that the sheriff did proceed to levy upon and attach certain personal property; and that before the completion of said levy, the defendants, for the purpose of preventing the levy or the completion thereof, tendered the sheriff the undertaking required by law, etc., which undertaking was duly taken and accepted by the sheriff. It was held that the complaint was defective in not stating that the sheriff did not complete the levy, or that he proceeded no further therewith. In this case the court said:—

“Assuming that the words ‘did proceed to levy upon,’ etc., do not necessarily imply that the sheriff took the property into his possession (and any acts clearly indicating his purpose to subject it to his control, would give the sheriff the legal possession as against the defendant in attachment), the complaint contains no averment that the sheriff did not ‘com-

plete the levy, or that he proceeded no further therewith: This would seem to be necessary. It is urged that the averment that the sheriff duly took and accepted the undertaking is sufficient, inasmuch as that it will be presumed that the sheriff did his duty, and that he would not have taken the undertaking and *also* the property. But such presumptions are applied, in proper cases, as a rule of evidence, not of pleading. A party must allege the material ultimate facts, even although some other fact, if proven, might create a presumption of the existence of one of the facts alleged. Besides, here there can be no doubt that the burden was cast on plaintiff at the trial to prove the cessation of proceedings towards a levy, or a return of the property to the extent to which a caption had been effected. Otherwise, the consideration of the undertaking (not under seal) would not be proven. In *Palmer vs. Melvin*, 6 Cal. 651, it was held that a complaint upon a bond given to release property from attachment was defective, because it did not aver that the property was released upon the delivery of the bond." The court said: "It is necessary to allege the consideration for the undertaking, and a mere reference to the condition of the bond is insufficient." The same rule is laid down in *Williamson vs. Blattan*, 9 Cal. 500, where the court say, further, that "the failure to allege the release of the property may be taken advantage of by *general demurrer*." In *Nickerson vs. Chatterton*, 7 Cal. 568, it was held that in an action against the sureties on a replevin bond, it is necessary to allege that the property was delivered to the party for whom the bond was given; in *Los Angeles vs. Babcock*, 45 Cal. 252, that in a suit on a bail bond the complaint must allege that the person bailed

was released from custody; in *Jenner vs. Stroh*, 52 Cal. 504, that when action was commenced on an undertaking given to procure the vacation of a default judgment, the complaint should have averred that the judgment was set aside. In such cases the consideration for which the undertaking is executed and delivered must be alleged and proved.

§ 646. **Plaintiff Bound by His Bond.**—In the case of *Graves vs. Moore*, 58 Cal. 435, the plaintiff, as sheriff, under an execution in favor of the defendants, *Moore, Hunt & Co.*, levied on certain personal property, including a billiard table; but, before the sale, *Strahle & Co.*, and also one *Soberanes*, each claimed the property pursuant to Sec. 689 of the Code of Civil Procedure. The sheriff sent written notice of the claim made by *Soberanes*, and also (it is claimed) of the claim of *Strahle & Co.*, to *Moore, Hunt & Co.*, who delivered to the sheriff an indemnity bond against the claim of *Soberanes*, and ordered him to sell. After the sale, *Strahle & Co.* sued the sheriff for the value of the property, which was paid. In an action brought by the sheriff to recover the amount of the judgment, also \$100 paid as counsel fees, the court found, among other facts, that the plaintiff notified the defendants of the claim of *Strahle & Co.*, and was thereupon directed to sell. It appears that upon being served with the summons in the suit brought against him by *Strahle & Co.*, the sheriff notified the attorney of *Moore, Hunt & Co.*, who appeared in the action, but afterwards abandoned the same, and notified the sheriff that they would make no further defense. The court found that the officer was entitled to recover, not only the amount of the judgment, but also counsel

fees, because Moore, Hunt & Co., by their agreement of indemnity, engaged to save the sheriff from the legal consequences of selling the property of the claimant, and their engagement applied not only to the act of selling, but to all the consequences resulting to him from that act. (*Civil Code, Secs. 2772, 2775.*) Having been compelled to pay by the judgment against him, he had a right to recover not only the amount of the judgment, but the expenses attending the action which he had to defend. (*Duffield vs. Scott, 3 T. R. 374; Stark vs. Raney, 18 Cal. 622.*)

The judgment against the sureties is conclusive evidence of his right to recover against them on the bond of indemnity, nor can they complain, as by virtue of Sec. 387, Code of Civil Procedure, California, the sureties have the right to intervene in the suit against the officer and defend the suit as a party to the record.

§ 647. **Judgment against Sheriff.**—The provision of the statute making the judgment, in an action against a sheriff, conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier—the real property in interest—and that he has in that action an opportunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of the action against the sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action. (*Dutil vs. Pacheco, 21 Cal. 442.*)

§ 648. **An Estoppel That Protects the Sheriff.**—If a court or referee, on proceedings supplementary to execution, orders property of the judgment debtor to be delivered up to the sheriff to be sold on the execution, the judgment creditor is estopped by the order from maintaining an action against the sheriff for selling the property. (*McCullough vs. Clark*, 41 Cal. 304.) In this case the judgment debtor had an insurance policy which he claimed to be exempt from execution. The court decided that that particular policy was not exempt, and that the sheriff, in seeking to apply it toward the payment of the judgment, in obedience to that order of the court, was only performing a duty enjoined upon him by law, and, therefore, could not be treated as a wrongdoer.

§ 649. **Indemnity Bond—Jurisdiction of Courts.**—In an action against the sheriff by claimants of attached property, when judgment has been rendered against him, and he moves for judgment over against the sureties on an indemnity bond given to him, under Sec. 1055 of the Code of Civil Procedure, the Superior Court, in which the action was brought, has jurisdiction to give judgment against the sureties, although each is bound for less than three hundred dollars. (*Moore vs. McSleeper*, 102 Cal. 277.)

§ 650. **Penalty for Not Paying Over Moneys.**—The statutory penalty against sheriffs for the nonpayment of moneys collected on execution is only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. If it were otherwise, an error in judgment, or even a hesitation to decide between adverse claimants, might work

the ruin of any honest and conscientious officer. The statute gives twenty-five per cent damages on the amount collected, and ten per cent per month in addition, from the time of the demand. It not infrequently occurs that a sheriff, on account of contests between creditors, and his own inability to decide the right, declines a demand, which turns out to have been justly and properly made. In such a case, to deprive him of the benefit of his return, and visit upon him the heavy penalties of the statute for failing to pay the money on demand, would be a cruelty and injustice which the law never contemplated. The argument that sheriffs might avail themselves of this doctrine and make false returns, so as to avoid the penalties of the Act, should be without any weight, and not entitled to consideration. The courts will presume that every officer will faithfully perform his duty, and has done so in every instance, until the contrary is shown.

§ 651. **Remedy by Motion.** The remedy by motion against a sheriff and his sureties, to compel him to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a *bona-fide* well-grounded doubt of the authority of the party to demand it. (*Wilson vs. Broder*, 10 Cal. 486.)

§ 652. **Liability for Acts of Deputy.** In an action of trespass against a sheriff, where he is declared against personally and not as sheriff, it is competent to prove that the defendant was sheriff and that his deputy

as such committed the trespass. The sheriff is liable for the acts of his deputy. In such a case it is not necessary to prove that the defendant directed his deputy to seize the particular property in question, in order to hold the defendant liable. (*Poinsett vs. Taylor*, 6 Cal. 78.) See also Sections 17, 631, *ante*.

§ 653. **Officer Not Responsible through Laches of Another.**—It is held, in *Lick vs. Madden*, 36 Cal. 208, wherein a county clerk was sued for an alleged failure to perform his duty in the matter of issuing a writ of attachment, that “although public officers should be made to answer in damages to all persons who may have been injured through their malfeasance, omission, or neglect, but if the damages would have been sustained, notwithstanding the mal-conduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officer cannot be held responsible.”

§ 654. **Release of Sheriff by Stipulation.**—Where an action of replevin is brought to recover property in the possession of a sheriff under attachment, and the parties stipulate that the property shall be turned over to a third party to await the final judgment in the cause, the sheriff is released from all liability, and a judgment *in form* only can be taken against him. (*Temple vs. Alexander*, 53 Cal. 3.)

§ 655. **Offices of Sheriff and Tax Collector Separate.**—The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They

are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other. (*People vs. Edwards*, 9 Cal. 286.)

§ 656. **Principal and Deputy—Levy of Separate Writs.**—In the case of *Whitney vs. Butterworth*, 13 Cal. 336, the court said: "This question touches the liability of the sheriff for not levying an attachment put in his hands on Sunday; the goods of defendant having been seized by his deputy on Monday, though the last writ came to his hands early on the same day and was levied on the property which was disposed of by the last writ—so that the first remained unsatisfied. . . . The speed with which the sheriff must proceed may depend upon the apparent necessity for quick action. But we have found no case which holds that the mere delay of a few hours, without some showing of special urgency, has been held sufficient to charge the sheriff. If we suppose, then, that the process reached the hands of the principal sheriff at one o'clock on Monday morning, we do not perceive that the sheriff would have been liable—nothing else appearing—for failure to levy it before. But the particular facts of this case make it stronger for the sheriff. The attachment of plaintiff was placed in the principal sheriff's hands on the night of Sunday between nine and ten o'clock. But it did not legally come to his hands as sheriff and for service until twelve o'clock. Fifteen minutes after twelve the other attachment came to the hands of the deputy; of this, it seems, the sheriff had no notice; and the deputy levied it at or about one o'clock. It seems, then, that the laches of the sheriff in delaying this levy for an

hour at midnight, is the foundation of his liability. This would be too harsh and unreasonable a requisition. It is plausibly argued that the deputy and his principal are the same person in law; and that the attachment in the hands of the defendants is, in legal effect, in the hands of the principal; and, consequently, the case is that of an officer having a senior writ and levying a junior writ on the property of the defendant. But the answer to this argument is that here the question is one of diligence, and that it cannot be contended that the mere omission of the deputy to inform the principal of his having process is such negligence as to charge him.

“ We have seen that the sheriff is not absolutely responsible for not executing process of this sort. He is responsible for unreasonably or not reasonably executing such process. But the test is, Was a failure, in the absence of any special circumstances, to execute *this* process, unreasonable, or did it subject the sheriff to responsibility for the debt? We may in this connection leave out of question the discussion as to the day (Sunday) on which the writ of the plaintiff was received. It is certain that, for all judicial purposes, Sunday is no day at all. The sheriff need not, on that day, indorse on the writ the fact of its reception. If given to him on that day he did not receive it as an officer, but as the mere agent of the plaintiff. He could do nothing with it on that day. He might, if he chose, recognize the receipt of it, but it imposed on him no higher or other duties than if he had received it on the next day. He, for all practical purposes, so far as respects this writ, was not the sheriff at all on Sunday. But we may safely concede, for all purposes of this suit, that he received the process on the next

day, and even at the beginning of that day. Was he bound, then, on this assumption, to go on and execute the writ, immediately after having received it, no peculiar necessity or apparent reason being shown why he should do so? No authorities have been cited to show that a sheriff is bound to quit everything else, immediately, on receiving an attachment or execution, and proceed to levy.

"The deputy had received Clark & Co.'s attachment early in the morning of Monday, perhaps at the very instant which marked the period which separated Sunday from Monday in the computation of time. But though Whitney's writ was in the hands of the sheriff before this time, yet the sheriff could do nothing with it—did not legally even receive it in his official capacity before. His connection with the writ of Whitney, as sheriff, commenced at the very time—at the utmost—when his deputy had the writ of Clark. But if Clark had no writ, we do not see that the sheriff would have been bound to go at once, on the instant when Monday commenced, and levy on the property of the defendants in attachment. Nor was the sheriff bound to the degree of diligence which required him to communicate to his deputy the intelligence that he had received the writ of Whitney before the deputy levied the process of Clark. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy, and the attachment first levied, by our statute, has the priority.

"But, probably, we might put this case on a broader ground. The sheriff could no more officially receive a writ on Sunday for service on Sunday than he could execute it on Sunday. Both these acts are of the same general character, and equally within the pro-

hibition of the statute. Not receiving it then as sheriff, he received it as the mere agent of the plaintiff. He so received it, not to execute it on Sunday, or to deal with it as a writ coming to him on that day as an officer. He might have been bound, as an agent, to deliver it to the sheriff, or to treat it as delivered when he could act. But this was a personal, not an official contract; it was a mere bailment which bound him, probably, as a man, but did not bind him as a sheriff, and, if he chose to disregard it entirely, we do not see that he would be bound as an officer. It is not necessary to press this point, for the reason that if he was bound to consider it as placed in his hands on Monday, at one o'clock, there was no such negligence in failing to execute it before as to subject him to liability. It is true that it may be urged that the sheriff and the deputy are one person in law; true, so far as this, that the sheriff is responsible for the acts of the deputy; but no one would contend that if a sheriff has a deputy at a remote precinct of a county, and a writ is placed in his hands, and he executes it on property in his precinct, that the sheriff would be responsible for this, if the consequence were to deprive B of the recovery of a claim, as the result of this levy--B having put a writ in the hands of the sheriff, at the county seat, an hour before the writ was placed in the hands of the deputy. Whitney trusted the sheriff to consider that the writ would be in his hands on Monday, and to receive and execute it as if it were handed to him on that day; but even if it had been, the sheriff was not bound to get out of his bed (no special circumstances existing) on the morning of that day, at one o'clock, and immediately proceed to the execution of the writ. It would be unjust to hold the sheriff to this degree of diligence, and, we think, illegal. We reverse the judgment, and remand the case." (See also Section 221, *ante*.)

CHAPTER XXII.

WRIT OF ASSISTANCE.

- § 657. Object of the Writ.
- § 658. Plaintiff Entitled to Immediate Service.
- § 659. Against Whom Will Issue.
- § 660. When Writ Will Be Refused.
- § 661. When Writ of Assistance May Issue.
- § 662. Where Tenants in Common.
- § 663. Who Not to be Removed.
- § 664. Alias Writ.
- § 665. False Return.

§ 657. **Object of the Writ.**—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed.

§ 658. **Plaintiff Entitled to Immediate Service.**—Under the writ of assistance, the party for whose benefit it is issued is entitled to immediate possession. The writ commands the sheriff to forthwith place the plaintiff in possession, and it is only by his consent that any delay in its service can be permitted.

In the case of *Chapman vs. Thornburg*, 17 Cal. 87, where the sheriff received a writ of assistance, commanding him forthwith to deliver possession of certain real estate to plaintiff, and went with plaintiff to the

premises for the purpose of putting him in possession, but for some reason not stated—in opposition to plaintiff's wishes and against his protestations—he declined to take any action in the matter, and then, on a subsequent day, the sheriff proceeded to execute the writ; but the parties in possession, being the parties against whom the writ ran, had, in the meantime, destroyed a number of valuable fixtures, and by their willful and malicious acts had injured the premises in other respects: *Held*, that the sheriff was liable for the damage thus done; that he was presumed to know what his duty was, and to have acted in willful violation of it; and that, as his duty was to execute the writ at the earliest practicable moment, and he neglected and refused so to do, it was through his fault that the parties in possession were enabled to commit the injury, and he must respond in damages, however remote.

§ 659. **Against Whom Will Issue.**—A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree. In a suit for foreclosure, all persons interested in the premises, prior to the suit, whether purchasers, heirs, devisees, remainder-men or incumbrancers, must be made parties, otherwise their rights will not be affected. The purchaser under a decree takes a title only as against the parties to the suit. (*Montgomery vs. Tutt*, 11 Cal. 314.)

One Lefevre, a married man, purchased certain real estate, subject to a mortgage thereon, which had been previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of Lefevre, but not the widow, a party, and after a decree of fore-

closure and sale and expiration of the time of redemption, received the sheriff's deed (himself being the purchaser), and thereupon applied to the court for a writ of assistance against the widow, who retained possession of a portion of the premises, which, on demand, she refused to surrender: *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to Lefevre became thereby the common property of himself and wife; that upon his death, the title to one-half of this property vested in her, subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that, not being bound by the decree, a writ of assistance could not be issued against her. (*Burton vs. Lies*, 21 Cal. 88.)

A person who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree. (*Montgomery vs. Byers*, 21 Cal. 107.) See also Secs. 661-2, *post*.

§ 660. **When Writ Will Be Refused.**—If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused. (*Steinbach vs. Leese*, 27 Cal. 296.)

A writ of assistance will not be issued against a purchaser of the mortgaged premises who buys during the pendency of a suit to foreclose, and who is not a party

to the suit, without actual or constructive notice of its pendency. (*Harlan vs. Rackerby*, 24 Cal. 561.) In this case the *lis pendens* in the foreclosure suit was filed subsequent to the purchase of the property from the defendant in that suit, and the purchaser was entitled to be heard in his defense before he could be deprived of his property.

In *Langley vs. Voll*, 54 Cal. 435, upon an application for a writ of assistance, to place the grantee of the purchaser of real estate under a judgment sale in possession, it appeared that the defendants had acquired, or claimed to have acquired, a new right to the possession from the purchaser; it was held that the writ should have been denied, and the parties left to settle their rights in a regular suit.

A party who forecloses a mortgage, given by one partner on, and obtains a sheriff's deed for, an undivided interest to partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver who has been appointed by the court, at the instance of such other partner, in an action commenced by him to dissolve the partnership, and have the partnership property sold to pay the debts. (*Autenreith vs. Hessenauer*, 43 Cal. 356.)

§ 661. **When Writ of Assistance May Issue.** — The power of a court to issue writs of assistance is limited to sales on judgments rendered by the same court to which the application for a writ of assistance is made, and also for the putting in possession of a purchaser under a constable's deed, in which last case the writ may issue out of the proper court of record upon showing made as to the judgment under which sale was made. (*People vs. Doe*, 31 Cal. 220.)

If the decree in a foreclosure suit directs the sale of all the mortgaged premises, and forecloses and bars the equity of redemption of the defendants, and directs that the purchaser at the sheriff's sale be let into possession, the person who receives the sheriff's deed, after a sale, is entitled to a writ of assistance as against all the defendants who were served with process or appeared in the action. This rule prevails as against a defendant who is not mentioned in the decree by name, and also against one whose name is not mentioned in the sheriff's deed. (*Frishie vs. Fogarty*, 34 Cal. 11.)

§ 662. **Where Tenants in Common.** It is the duty of the sheriff, in the execution of a writ of assistance, to place the purchaser on foreclosure of mortgage of an estate in common in the possession of every part and parcel of the land, jointly with the other tenants in common. (*Tevie vs. Hicks*, 38 Cal. 234.) In this case the sheriff found, on going to the ranch of defendant, that Mrs. Hicks, wife of defendant, held in her own right, as her separate property, an undivided interest in the whole rancho, derived from a source independent of her husband. In the opinion of the court "she was not liable, under any writ to which the applicant has shown himself entitled, to be ejected or removed from the rancho, or any portion thereof; but she, or anyone in possession for her, was and is bound to admit the applicant to a joint and common possession and occupancy with her, not only of the house and two hundred acres surrounding the same, but of every part and parcel of the entire rancho."

§ 663. **Who Not to be Removed.**—In the execution of the writ, the sheriff cannot remove any of the

tenants in common who hold under a title derived from a source independent of him through whom the purchaser claims. (*Teviss vs. Hicks*, 38 Cal. 234.)

§ 664. **Alias Writ.**—If the return to the first writ does not clearly declare that it has been fully executed, and it is made to appear by affidavits that it has not been, it is competent for the court to issue another writ. (*Teviss vs. Hicks*, 38 Cal. 234.)

§ 665. **False Return.**—If the sheriff neglects or refuses to fully execute the writ, or makes a false return of his acts thereunder, he is liable to the party aggrieved for all accruing damages.

CHAPTER XXIII.

WRIT OF RESTITUTION.

- § 666. Requirements of the Writ.
- § 667. Writ Does Not Determine Right of Property.
- § 668. Whom the Sheriff May Dispossess.
- § 669. Who Are Bound by the Judgment.
- § 670. Whom the Sheriff May Not Dispossess.
- § 671. Who May Be Removed.
- § 672. Notice of Pending Suit.
- § 673. Evasion of Process.
- § 674. Colorable Possession of Land.
- § 675. Possession of Third Parties.
- § 676. When Mandamus Will Issue.
- § 677. Forcible Entry against Sheriff.
- § 678. Must Show Right of Occupancy.
- § 679. When Sheriff May Demand Indemnity.
- § 680. Error in Writ.

§ 666. **Requirements of the Writ.**—The writ of restitution requires the officer to restore the plaintiff to possession of the premises described therein, and usually to make a money judgment due to plaintiff out of the property of the defendant. Under it the plaintiff is entitled to immediate possession of the premises and to the money judgment as soon as it can be made.

§ 667. **Writ Does Not Determine Right of Property.** The writ of restitution, obtained by the

defendants in an action of forcible entry and detainer, does not determine the right of property, or the right of possession. It simply decides a restoration to immediate possession, which has been taken away by an illegal and unwarranted ouster, tending to produce a breach of the peace.

§ 668. **Whom the Sheriff May Dispossess.**--- "What parties can be dispossessed under a writ of *habere facias possessionem* under any and all circumstances, is not very clear upon authority. Some cases go so far as to hold that all persons who enter into possession after the commencement of the action, regardless of how or by what title they entered, must go out, upon the ground that otherwise there might be no end to litigation; while other cases seem to go no further than to hold that the defendant and those entering under or succeeding to him in the possession of the land only need go out, upon the ground that none are affected by the judgment except parties and privies, and that no one can be deprived of his property without first having been allowed his day in court; and we apprehend," say the court in the case of *Long vs. Neville*, 29 Cal. 131, "that these two principles,¹ which practically amount to the same thing, together furnish the true test for the solution of every case. . . . *Prima facie*, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant."

In this case, it was held that it is the duty of the sheriff, having the writ of *habere facias possessionem*, to remove all persons who came upon the property after the suit was brought, except a person other than

the defendant, who is in possession under a title adverse to the defendant; and that where ejectment is brought against a tenant alone, and pending the action the landlord dispossesses him and leases to another tenant who has no notice of the pendency of the action, it is the duty of the sheriff who receives the writ of *habere facias possessionem* to remove the second tenant.

Willis Long and W. B. Long commenced an action of ejectment against two persons named Hull, who were in the actual possession of the land at the time the action was brought. The Hulls were in possession as tenants of one Ellis, who attempted to intervene by petition, but the plaintiffs demurred, and the demurrer was sustained. The Hulls made default, and judgment was entered against them, and them only, for the possession of the land. Pending the action of ejectment, Ellis brought an action against the Hulls, obtained judgment and dispossessed the Hulls. Afterwards, Ellis leased the land to one Brown, who was in possession at the time the sheriff received the writ. The sheriff refused to execute the writ upon Brown. The Supreme Court held that Brown came in under the same title and held the same right to the possession which was held by the Hulls when the action was commenced against them, and that the sheriff could have lawfully dispossessed Brown, and having failed to do so, he made himself and his sureties liable. (*Long vs. Neville, ante.*)

§ 669. **Who Bound by Judgment in Ejectment.**—If a defendant in ejectment conveys the land pending litigation, and the grantee enters upon the land with or without notice of the pending suit, he is

not only liable to be dispossessed by the writ of restitution, if the plaintiff obtains judgment, but is also bound by the judgment, as an instrument of evidence, to the same extent as it would have been binding upon his grantor, had no conveyance been made. (*Watson vs. Dowling*, 26 Cal. 125.)

§ 670. **Whom the Sheriff May Not Dispossess.**—A sheriff has no authority by virtue of a writ of restitution to remove from the premises described in the writ persons who were not parties nor privies to the judgment on which the writ was issued, and did not enter by collusion with the defendant in the judgment pending the suit. (*Tevie vs. Ellis*, 25 Cal. 515; *Archbishop vs. Shipman*, 69 Cal. 586; *Irving vs. Cunningham*, 77 Cal. 52.) Where the owner of certain real estate, who was not a party in the suit, was threatened by the sheriff with ejectment from his land, it was held that he was not entitled to an injunction against the sheriff. The plaintiff and his tenant were not only beyond the reach of the writ, but were unaffected by the judgment as an instrument of evidence, and therefore had nothing to fear from either; that if the sheriff interfered with the plaintiff's possession of the lots, the writ would not only fail as a justification, but would be pertinent to convict the sheriff of an act of official oppression. (*Tevie vs. Ellis*, ante.)

In *Watson vs. Dowling*, 26 Cal. 125, the court held that where several persons are owners of a tract of land as tenants in common, and the interest of one passes to a purchaser under execution sale, who brings ejectment against the execution debtor alone, and recovers judgment, neither the other tenants in common nor the grantees who purchase and enter upon the

land pending the suit, can be dispossessed by the sheriff by virtue of the writ of restitution.

Parties in exclusive possession of land, claiming adversely, at the commencement of an ejectment suit to which they were not made parties, are not affected by the judgment therein. (*McLeran vs. McNamara*, 60 Cal. 610.)

A person in possession of the demanded premises at the time of the commencement of the action to recover possession, cannot be removed under a writ issued on a judgment in the case, unless he is made defendant, and judgment is rendered against him after the court acquires jurisdiction of his person. (*Ford vs. Doyle*, 37 Cal. 346.)

If neither the tenant nor his landlord are parties to an action of ejectment, and the landlord was in possession when the suit was commenced, but subsequently leased to the tenant, the tenant cannot rightfully be removed by a writ of restitution issued in such action. (*Calderwood vs. Pyser*, 31 Cal. 333.)

One who, after an action of ejectment has been commenced, enters upon the demanded premises, but does not enter under the defendant, or by collusion with him, and is not made a party to the action, cannot be removed by virtue of a writ of restitution issued on a judgment rendered in the action. (*Mayo vs. Sprout*, 15 Cal. 99.)

§ 671. **Who May Be Removed.** A party and her tenants, coming into possession of lands, after an action brought to recover possession, under a prior unrecorded deed from two of the defendants in the action, of which plaintiff had no notice when the action was commenced, were properly dispossessed under a writ of restitu-

tion, issued on a judgment for plaintiff in said action. (*Mayne vs. Jones*, 34 Cal. 483.)

In the case of *Sampson vs. Ohleyer*, 22 Cal. 200, pending an action of ejectment against a tenant, the latter transferred possession to his landlord, who had actual notice of and defended the suit, but was not made a party, and plaintiff recovered judgment; it was held that, under the writ of restitution authorized by the judgment, the landlord might be dispossessed and that in ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant but all persons who receive possession of the premises from him with actual notice of the pending suit.

If the plaintiff in ejectment dies after a judgment in his favor has been rendered, a writ of restitution may be issued on the judgment, at the instance and for the benefit of his successor in interest in the property. (*Franklin vs. Merida*, 50 Cal. 289.)

Under a writ of possession against the husband, his wife should be dispossessed, her only holding being such as she had by virtue of her marital relations with the defendant in the writ. (*Huerstal vs. Muir*, 64 Cal. 450.)

§ 672. **Notice of Pending Suit.**—The 27th section of the Practice Act (*California. Sec. 409 Code Civil Procedure*), relating to the filing of *lis pendens*, does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones, or to enforce liens upon legal estates. (*Watson vs. Dowling*, 26 Cal. 125.)

§ 673. **An Evasion of Process.**—If the defendant, pending an action against him to recover posses-

sion of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained. (*Wetherbee vs. Dunn*, 36 Cal. 147.)

§ 674. **Colorable Possession of Land.**—Where a defendant in ejectment has taken possession of land in collusion with the plaintiff, for no other purpose than to afford such plaintiff a pretext to take possession under a writ of restitution, such pretended possession will be disregarded. (*South Beach L. Association vs. Christy*, 41 Cal. 501.)

§ 675. **Possession of Third Parties.**—If the plaintiff obtains judgment in an action of forcible entry and detainer, but does not obtain possession of the property, and a writ of restitution is not issued, and the judgment is afterwards reversed, and the action dismissed, and during the pendency of the action third parties obtain possession of the property by collusion with a servant of the defendant, the defendant is not entitled to a writ to be restored to possession as against these third parties. (*Bowers vs. Cherokee Rob*, 46 Cal. 280.)

§ 676. **When Mandamus Will Issue.**—In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such a verdict is conclusive that the plaintiff was peaceably in actual

possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants, C. and V., and that the corporation did not participate in the trespass. The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another; and such a verdict is conclusive against the possession of the corporation. (*Fremont vs. Crippen*, 10 Cal. 211.)

Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory *mandamus* against the sheriff to compel him to execute the writ.

To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application.

Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual. (*Fremont vs. Crippen*, 10 Cal. 212.)

§ 677. **When Forcible Entry Will Not Lie against Sheriff.**—An action under the Act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ. (*Janson vs. Brooks*,

29 Cal. 214.) Nor is the sheriff guilty of a forcible entry, if acting in good faith therein.

§ 678. **Must Show Right of Occupancy.**—A person in possession of land where a writ of restitution is served, is presumed to hold under the defendant in the action, and to avoid being dispossessed by the writ, must show affirmatively that he holds by a right independent and paramount. (*Sampson vs. Ohleyer*, 22 Cal. 200.)

§ 679. **When Sheriff May Demand Indemnity Bond.**—When a sheriff goes to execute a writ of possession issued on a judgment in an action to recover land, if he finds other parties in possession than those named in the complaint, who claim that they are rightfully in possession, not in privity with the defendants, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may demand indemnity, and, unless it is given, may refuse to execute the writ. This is the law, even if the premises are specifically described in the writ. (*Long vs. Neville*, 36 Cal. 455.)

If a sheriff has wrongfully turned a person out of possession of land under a writ of restitution, he will be restored by the court to the possession, on motion made for that purpose. (*S. B. Land Asso. vs. Christy*, 41 Cal. 501; *Mayo vs. Sprout*, 45 Cal. 99.)

§ 680. **Error in Writ.**—In an action of ejectment, if the execution correctly refers to a judgment, in such manner as to identify it, it is sufficient to justify the sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. (*Franklin vs. Merida*, 50 Cal. 289.)

CHAPTER XXIV.

ARRESTS.

- § 681. Duty to Arrest Offenders.
- § 682. Arrest without Warrant.
- § 683. When Warrant Must Be Shown.
- § 684. Officer May Summon Aid—Posse Comitatus.
- § 685. Refusing to Aid Officers.
- § 686. How Arrest Is Made.
- § 687. When Force May Be Used.
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- § 709. Arrest for Fraud and Torts, etc.
- § 710. Prisoners Brought from Other Counties as Witnesses.
- § 711. When Prisoner May Not Be Handcuffed.
- § 712. Service of Bench Warrant.
- § 713. Making Arrests, etc., without Authority.
- § 714. Refusing to Arrest Criminals.
- § 715. Justifiable Homicide in Making Arrest.

§ 681. **Duty to Arrest Offenders.**—It is the duty of the sheriff to arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense. (*California. Sec. 93 Co. Govt. Bill, Stats. 1893, p. 372.*)
Washington. Sec. 207 Penal Code.

§ 682. **Arrest without Warrant.**—A sheriff or any other peace officer may, with or without a warrant, arrest a person under the following conditions:—

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony although not in his presence.

"3. When a felony has, in fact, been committed, and he has a reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony." (*California. Sec. 836 Penal Code.*)

Nevada. Sec. 4017 General Statutes, 1885.

Utah. Secs. 4854, 4856 Compiled Laws, 1888.

§ 683. **When Warrant Must Be Shown.**—If the person making the arrest is acting under the au-

thority of a warrant, he must show the warrant, if required. (*California. Sec. 842 Penal Code.*)

Montana. Sec. 65, p. 417, Compiled Statutes, 1887.

Nevada. Sec. 4013 General Statutes, 1885.

Utah. Sec. 4860 Compiled Laws, 1888.

§ 684. **Officer Making Arrest May Summon Aid—Posse Comitatus.**—An officer, or any person making an arrest, may orally summon as many persons as he deems necessary to aid him therein. (*California. Sec. 150 Penal Code.*)

Colorado. Sec. 856 Mills' Ann. Statutes, 1891.

Idaho. Sec. 7400 Revised Statutes, 1887.

Montana. Sec. 73, p. 418, Compiled Statutes, 1887.

Nevada. Sec. 4009 General Statutes, 1885.

Oregon. Secs. 997, 1568, 1840 Hill's Codes, 1892.

Utah. Sec. 4857 Compiled Laws, 1888.

§ 685. **Refusing to Aid Officers.**—"Every male person above eighteen years of age who neglects or refuses to join the *posse comitatus*, or power of the county, in arresting any person, or in retaking an escape, or to prevent any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge or justice of the peace or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than one thousand dollars." (*California. Sec. 150 Penal Code.*)

Colorado. Sec. 1366 Mills' Ann. Statutes, 1891.

Oregon. Secs. 998, 1840 Hill's Codes, 1892.

Washington. Sec. 1801 Penal Code.

§ 686. **How Arrest Is Made.**—"The person making the arrest must inform the person to be arrested

of the intention to arrest him, of the cause of the arrest and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." (*California. Sec. 841 Penal Code.*)

Montana. Secs. 63-4, 71-2, pp. 417-8, Compiled Statutes, 1887.

Nevada. Secs. 4010-13 General Statutes, 1885.

Utah. Secs. 4852-3 Compiled Laws, 1888.

Washington. Secs. 1259-60 II Hill's Codes, 1891.

§ 687. **When Force May Be Used.**—"When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest." (*California. Sec. 843 Penal Code.*)

Nevada. Sec. 4014 General Statutes, 1885.

§ 688. **When Doors May Be Broken.**—"To make the arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." (*California. Sec. 844 Penal Code.*)

Nevada. Secs. 4015 6, 4018, 4028 Gen. Stats., 1885.

Utah. Secs. 4862 3 Compiled Laws, 1888.

Washington. Sec. 1379 II Hill's Codes, 1891.

§ 689. **Taking Weapons from Prisoners.**
"Any person making an arrest may take from the per-

son arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken." (*California. Sec. 846 Penal Code.*)

§ 690. **When Arrest May Be Made at Night.**—

"If the offense charged is a felony, the arrest may be made on any day, and any time of the day or night." (*California. Sec. 840 Penal Code.*)

Nevada. Secs. 4010, 4019 General Statutes, 1885.

Utah. Secs. 4854, 4858 Compiled Laws, 1888.

§ 691. **When Arrest Cannot Be Made at Night.**

"When the offense charged is a misdemeanor, the arrest cannot be made at night unless upon the direction of the magistrate, indorsed upon the warrant." (*California. Sec. 840 Penal Code.*)

Nevada. Sec. 4010 General Statutes, 1885.

Utah. Sec. 4858 Compiled Laws, 1888.

§ 692. **Nighttime Defined.**—The phrase "night-time," as used herein, means the period between sunset and sunrise. (*California. Sec. 3260 Political Code.*)

§ 693. **Name of Defendant in Warrant.**—"The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name." (*California. Sec. 815 Penal Code.*)

§ 694. **How Executed in Another County.**—"If the defendant is in another county than that in which the warrant is issued, it may be served therein upon the written direction of a magistrate of the

county in which it is to be served, indorsed upon the warrant, signed by him, with his name of office, and dated at the county, city or town where it is made, to the following effect: 'This warrant may be executed in the county of ——' (naming the county)." Such indorsement "cannot, however, be made, unless the warrant be accompanied with a certificate of the clerk of the county where it was issued, under seal, as to the official character of the magistrate; or unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued." (*California. Secs. 819, 820 Penal Code.*)

§ 695. **Rescuing Prisoners.**—"Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any officer or person having him in lawful custody, is punishable under Sec. 101 of the Penal Code of California. But one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape." (*People vs. Ah Teung, 92 Cal. 421.*) See also:

Colorado. Sec. 1284 Mills' Ann. Statutes, 1891.

Utah. Sec. 4411 Compiled Laws, 1888.

§ 696. **Taking Prisoner before Magistrate.**—"If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county." (*California. Sec. 821 Penal Code.*)

"If the offense charged is a misdemeanor, and the

defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly." (*California. Sec. 822 Penal Code.*)

"On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant and undertaking to the clerk of the court at which the defendant is required to appear." (*California. Sec. 823 Penal Code.*)

"If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon indorsed and signed by him." The defendant must in all cases be taken before the magistrate without unnecessary delay. (*California. Secs. 824-5 Penal Code.*)

Montana. Secs. 69, 85, pp. 418, 420, Compiled Statutes, 1887.

Nevada. Secs. 3997-4006 General Statutes, 1885.

Utah. Secs. 4865-7 Compiled Laws, 1888.

§ 697. **Liability for Delay.**—"Every public officer or other person, having arrested a person on a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor." (*California. Sec. 145 Penal Code.*)

Utah. Sec. 4433 Compiled Laws, 1888.

§ 698. **Proceedings before Magistrate.**—“If the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.” (*California. Sec. 826 Penal Code.*)

Nevada. Sec. 4003 General Statutes, 1885.

Utah. Sec. 4872 Compiled Laws, 1888.

§ 699. **Offense Triable in Another County.**—“When an information is laid before a magistrate, of the commission of a public offense, triable in another county of the State, but showing that the defendant is in the county where the information is laid, the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.” The officer must then take the defendant and the papers to such magistrate, with his return indorsed on the warrant. If the offense in such case is a misdemeanor, the officer must, if the defendant require it, take him before the magistrate of the county in which the warrant was issued, who must admit him to bail. (*California. Secs. 827-9 Penal Code.*)

Nevada. Sec. 4004 General Statutes, 1885.

§ 700. **Retaking after Escape.** “If a person arrested escape, or is rescued, the officer may immediately pursue and retake him at any time and any place within the State. To retake an escaped prisoner, the officer

pursuing may break open an outer or inner door or window, if, after notice of his intention, he is refused admittance." (*California. Secs. 854-5 Penal Code.*) If the prisoner escape into another State, the officer cannot retake him except upon a requisition from the governor of the State from which he escaped.

Montana. Sec. 74, p. 418, Compiled Statutes, 1887.

Nevada. Secs. 4027-8 General Statutes, 1885.

Utah. Secs. 4870-1 Compiled Laws, 1888.

§ 701. **Jurisdiction of Offenses.**—When a public offense is committed on the boundary of two or more counties in California or within five hundred yards thereof, the jurisdiction is in either county. When an offense is committed "on board a vessel navigating a river, bay, slough, lake or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this State, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates. When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. When property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another, the jurisdiction of the offense is in either county; but if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the former." The jurisdiction on violation of the law relating to prize-fights,

is in any county in which any act is done toward the commission of the offense, into, out of or through which the offender passed to commit the offense, or where the offender is arrested. (*California. Secs. 782, 783, 785, 786, 795 Penal Code.*)

§ 702. **Arrest in Civil Actions.**—Arrest in civil actions is treated in this work in the chapter on "Arrest and Bail," *ante*.

§ 703. **Duty on Arresting Insane Person.**—It is the duty of the sheriff, immediately upon arresting any person charged with being insane, to notify the district attorney of the county in which the arrest is made. (*California. Statutes 1889, p. 329.*)

§ 704. **Arrest for Contempt of Court.**—When a party to a divorce case is ordered imprisoned for contempt in failing to pay alimony, the sheriff cannot place the person under arrest until the commitment has been placed in his hands.

§ 705. **Arrest by Telegraph.**—"A justice of the Supreme Court, or a judge of a Superior Court, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers, and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it, as though he held an original warrant issued by the magistrate making the indorsement."

"Every officer causing telegraphic copies of warrants to be sent, must certify as correct, and file in the tele-

graph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder." (*California. Secs. 850-1 Penal Code.*)

Nevada. Sec. 937 General Statutes, 1885.

Utah. Sec. 4868 Compiled Laws, 1888.

§ 706. **Electors—When Privileged from Arrest.**—"Electors are privileged from arrest, except from an indictable offense, during their attendance on the election, and in going to and returning from the same." (*California. Sec. 1069 Political Code.*) See also Art. II, Sec. 2, Constitution; see also Sec. 159, *ante*.

Colorado. Sec. 407, p. 283, 1 Mills' Ann. Statutes, 1891.

§ 707. **Legislature—Exemption from Arrest.**—"Members of the Legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest, and they shall not be subject to any civil process during the session of the Legislature, nor for fifteen days next before the commencement and after the termination of each session." (*California. Art. IV, Sec. 2 Constitution.*) See also Sec. 159, *ante*.

Colorado. Sec. 339, p. 226, 1 Mills' Ann. Statutes, 1891.

§ 708. **Militia Exemptions from Arrest.**—"No person belonging to the military forces is subject to arrest, on civil process, while going to, remaining at or returning from any place at which he may be required to attend for military duty." (*California. Sec. 2021 Political Code.*) "No person shall be impris-

oned for a militia fine in time of peace." (*California, Art. I, Sec. 15, Constitution.*) See also Sec. 159, *ante. Colorado. Sec. 3115 Mills' Ann. Statutes, 1891.*

§ 708a. **Exemption of Witnesses from Arrest.**—"Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom." (*California. Sec. 2067 Code Civil Procedure.*) See also Sec. 159, *ante.*

§ 709. **Arrest for Fraud and Torts, Etc.**—"No person can be arrested for debt in any civil action, on mesne or final process, except in cases of fraud, nor in civil actions for torts, except in cases of willful injury to persons or property." (*California. Art. I, Sec. 15, Constitution.*)

§ 710. **Prisoners Brought from Other Counties as Witnesses.** In California, when it is necessary to have a person imprisoned in the State prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made; or his deposition may be taken. (*Secs. 1333, 1346 Penal Code.*)

§ 711. **When Prisoner May Not Be Handcuffed.** By the common law, a prisoner is entitled to appear for trial, upon his own plea of not guilty, free

from all manner of shackles or bonds, unless there is danger of his escape. (*People vs. Harrington*, 42 Cal. 165.)

§ 712. **Service of Bench Warrant.**—The bench warrant, for the arrest of a person under indictment or presentment, may be served in any county, and need not be indorsed by a magistrate of that county. When the offense is not punishable with death, the officer must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail. But if the offense is punishable with death, the officer must deliver him into custody, according to the command of the bench warrant. (*California. Secs. 934-6, 979-986, 1195-99 Penal Code.*)

For arrest after presentment in California, see Secs. 935-6, 979-986 Penal Code; and for arrest after judgment, Secs. 1197-9 Penal Code.

§ 713. **Making Arrests, etc., without Authority.**—"Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor." (*California. Sec. 146 Penal Code.*)

§ 714. **Refusing to Arrest Criminals.**—"Every sheriff, coroner, keeper of a jail, constable or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punish-

able by fine not exceeding \$5,000, and imprisonment in the county jail not exceeding five years." (*California. Sec. 142 Penal Code.*)

An officer, nevertheless, should be guarded as to receiving persons as prisoners without a warrant or commitment.

Colorado. Sec. 1292 Mills' Ann. Statutes, 1891.

Nevada. Sec. 1702 General Statutes, 1885.

Utah. Sec. 4432 Compiled Laws, 1888.

Washington. Sec. 181 Penal Code.

§ 715. **Homicide Justifiable in Making Arrest.**—Homicide is justifiable when committed by public officers and those acting by their command, in their aid and assistance, when necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest. (*California. Sec. 196 Penal Code.*)

Colorado. Sec. 1189 Mills' Ann. Statutes, 1891.

CHAPTER XXV.

HABEAS CORPUS.

- § 716. Receipt of Writ.
- § 717. Service of the Writ.
- § 718. Manner of Service.
- § 719. The Return.
- § 720. Certificate of Service by Sheriff.
- § 720a. Prisoner Held by United States Court.
- § 721. Warrant May Issue Instead of Writ.
- § 722. Service on Holidays.
- § 723. No Fees Chargeable.

§ 716. **Receipt of Writ.**—Upon receipt by the sheriff of a writ of *habeas corpus* to be served by him, and directed to another person, the officer should indorse upon it the time of its reception, and make and retain a copy of the writ. Under the California practice, if it is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service; if it is directed to any other person, it must be delivered to the sheriff for service. (*California. Sec. 1478 Penal Code.*)

§ 717. **Service of the Writ.**—If the writ be placed in the hands of the sheriff for service upon another person, it must be by him “served upon such

person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling house or of the place where the party is confined or under restraint." (*California. Sec. 1478 Penal Code.*) See also the next Section. Compare :

Arizona. Secs. 2260-64 Revised Statutes, 1887.

Colorado. Sec. 1609 General Statutes, 1883.

Idaho. Secs. 8344-5 Revised Statutes, 1887.

Montana. Secs. 1168-71 Comp. Stats., 1887, p. 975.

Nevada. Secs. 3675-79 General Statutes, 1885.

Oregon. Secs. 642, 646 I Hill's Codes, 1892.

Utah. Secs. 5291-3 Compiled Laws, 1888, Vol. II.

Washington. Secs. 714-717 II Hill's Codes, 1891.

§ 718. **Manner of Service.**—In the absence of statutory provision as to the manner of service of the writ, as in most of the Pacific States, there is a diversity of opinion among attorneys and officers as to the manner in which this writ should be served—whether service should be made with the original writ or a copy thereof. Section 1478 of the Penal Code of California seems to require the service to be made with the original writ; and Section 1479 gives weight to this construction by providing that, if the person to whom the writ is directed refuses, after service, to obey the same, the court or judge, *upon affidavit* (not upon any return of the officer who served the writ), must issue an attachment against such person, etc. Under the old common law practice, the original writ of *habeas*

corpus was served upon the person to whom it was directed. The same practice is followed in the State of New York, the codes of which State were closely followed by the code commissioners of California in codifying the laws of this State. In Utah and Oregon, the statute expressly requires delivery of the original writ.

Oregon. Sec. 642 *I Hill's Codes*, 1892.

Utah. Sec. 5291 *Compiled Laws*, 1888, Vol. II.

§ 719. **The Return.**—"The person on whom the writ is served, must state in his return, plainly and unequivocally:—

"1. Whether he has or has not the party in his custody, or under his power or restraint.

"2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint.

"3. If the party is detained by virtue of any writ, warrant or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return." (*California.* Sec. 1480 *Penal Code.*)

No writ of *habeas corpus* can be disobeyed for defect in form. (*Sec. 1495 ditto.*) Compare:

Arizona. Secs. 2265, 2294 *Revised Statutes*, 1887.

Colorado. Secs. 1609-11 *General Statutes*, 1883.

Idaho. Sec. 8347 *Revised Statutes*, 1887.

Montana. Sec. 1173 *Compiled Statues*, 1887, p. 976.

Nevada. Secs. 3680, 3691, 3698, *Gen. Stats.*, 1885.

Oregon. Secs. 613-4, *I Hill's Codes*, 1892.

Utah. Sec. 5296 *Compiled Laws*, 1888, Vol. II.

Washington. Secs. 719, 732 *II Hill's Codes*, 1891.

§ 720. **Certificate of Service by Sheriff.**—Section 1480 of the Penal Code of California commands that “the person upon whom the writ is served must state in his return,” etc. The statute contemplates but one return, and that is of the person to whom the writ is directed. When the writ is served by the sheriff upon another person, a record of the service by the officer should be made in the court from which the writ issued, so that parties interested in the proceeding need not be compelled to seek the officer in person to ascertain if service had been made. To this end a certificate of service may be made by the officer, and filed with the clerk of the court, upon a copy of the writ. Such certificate may be in the following form:—

In the Matter of the Application of
JOHN DOE
For a Writ of *Habeas Corpus*.

State of California,
County of Alameda. } ss.

I hereby certify that on the

..... day of 18..., I served the writ of *habeas corpus* issued in the above entitled matter (a copy of which is hereto annexed) upon the said by delivering said writ to him personally at said County of Alameda.

Dated [Signed].....
Sheriff of County.

§ 720a. **Prisoner Held by United States Court.**—A state judge or court has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. When it is made known to the state court that the prisoner is held by virtue of an order of a court of the

United States, the writ should be discharged. (*Ableman vs. Booth*, 21 *Howard U. S.* 506; *Tarble's Case*, 13 *Wallace U. S.* 397.) In such a case, the sheriff should not bring the prisoner into court under the writ, but should make his return to the writ showing the facts. For form of return, see Sec. 832, *post*.

§ 721. **Warrant May Issue Instead of Writ.**

—When it appears that there is reason to believe that the person detained will be carried out of the jurisdiction of the court or judge, a warrant may be issued (instead of writ of *habeas corpus*) “directed to the sheriff, coroner or constable, commanding the officer to take the person held in custody, confinement or restraint, and forthwith bring him before such court or judge. A command may also be inserted in the warrant for the apprehension of the person charged with such illegal detention and restraint.” (*California, Secs. 1497–8, Civil Code Procedure.*)

Arizona. Sec. 2284 Revised Statutes, 1887.

Idaho. Sec. 8364 Revised Statutes, 1887.

Montana. Compiled Statutes, 1887, Vol. II, Secs. 1193–4.

Nevada. Sec. 3679 General Statutes, 1885.

Oregon. Secs. 616, 618 I Hill's Codes, 1892.

§ 722. **Service on Holidays.**—Statutory provision is usually made for the issuance and service of the writ of *habeas corpus* on any day or at any time.

Arizona. Sec. 2289 Revised Statutes, 1887.

California. Sec. 1502 Penal Code.

Idaho. Sec. 8369 Revised Statutes, 1887.

Montana. Compiled Statutes, 1887, p. 975, Secs. 1166–70.

Nevada. Sec. 3705 General Statutes, 1885.

Washington. Sec. 731 II Hill's Codes, 1891.

§ 723. **No Fees Chargeable.**—Usually no fees are to be charged in *habeas corpus* cases, mention being either omitted in the respective fee bills or express provision being made prohibiting the collection of fees.

California. Sec. 4333 Penal Code; Sec. 228 Co. Govt. Bill.

Idaho. Sec. 2138 Revised Statutes, 1887.

CHAPTER XXVI.

FUGITIVES FROM JUSTICE.

- § 724. Fugitives from Justice, Generally.
- § 725. When Extradition May Be Had.
- § 726. Proceedings for Requisition.
- § 726a. Forms for Application.
- § 727. Arrest of Fugitive for Extradition.
- § 728. Expense of Extradition.
- § 729. Requisites for Obtaining Requisition.
- § 730. No Fee for Procuring Extradition Papers.

§ 724. **Fugitives from Justice, Generally.**—Section 2 of Article IV of the Constitution of the United States provides that “a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.” Pursuant to these provisions, the several states have enacted statutes prescribing the procedure for the arrest and surrender of such criminals within the boundaries of the state and for the institution of proceedings to bring back criminals who have fled to other states.

Arizona. Secs. 2357–70 *Penal Code.*

California. Secs. 1547–58 *Penal Code*; Sec. 380 *Political Code.*

Colorado. Secs. 2037-46 *Mills' Ann. Statutes*, 1891.

Idaho. Secs. 8415-26 *Revised Statutes*, 1887.

Montana. Secs. 449-450 *Crim. Prac. Act*.

Nevada. Secs. 4533-41 *General Statutes*, 1885.

Oregon. Secs. 1695-1709 *I Hill's Codes*, 1892.

Utah. Secs. 5274-81 *Compiled Laws*, 1888.

Washington. Secs. 1387-92 *II Hill's Codes*, 1891;
Sec. 2946 *I ditto*.

§ 725. **When Extradition May Be Had.**—In order that the arrest and delivery of the fugitive may be had, there must be actually pending against him in the state making the demand a charge of criminality in the form of an indictment, information, affidavit or other accusation authorized by the laws of the state. (5, 6 *N. Y.* 182; 3 *McLean* 121; 49 *Cal.* 434.) The affidavit, upon which the requisition issues, need not set forth the crime charged with all legal exactness (5 *Cal.* 237); neither is it necessary that a copy of the indictment shall accompany the demand (7 *Ind.* 611); but the requisition or proceeding must show that the crime was committed within the jurisdiction of the state making the application, and that the criminal has fled from justice and taken refuge in another state. (3 *McLean*, 121.)

§ 726. **Proceedings for Requisition.**—A person who flees from justice to another state may be brought back upon a requisition upon the governor of the state to which the fugitive has escaped. To obtain such requisition, application must be made to the governor of the state from which the criminal has fled, accompanied with an affidavit of the person making the application, setting forth the name of the fugi-

tive, the crime with which he is charged or has been convicted, and the present whereabouts of the fugitive, together with an exemplified copy of the indictment found or other judicial proceedings had against him in the state in which he is charged to have committed the offense. All papers thus forwarded must be in duplicate. The application for a requisition should request the appointment of some person (naming him) as a suitable person to receive and bring back the fugitive. Care should be taken to see that the proper certificate is made out, signed by the district attorney, in accordance with Sec. 729, *post*, and forwarded with the other papers to the governor.

§ 726a. **Forms for Application.**—Forms of affidavit and request for requisition are given in the chapter on Forms (see Chapter XXXI, Secs. 871–2, *post*) and may be varied so as to conform to the particular proceeding under which the fugitive is sought to be arrested.

§ 727. **Arrest of Fugitive for Extradition.**—A fugitive from another state may be committed by the magistrate to the proper custody in the county for a reasonable time, to enable the arrest of the fugitive under the warrant of the governor, on the requisition of the governor of the state in which the crime was committed. The accounts of the person employed in bringing back such fugitive must be audited by the state board of examiners and paid out of the state treasury. The proceedings for the arrest and commitment are, in all respects, similar to those provided for the arrest and commitment of a person charged with any public offense committed in the state, except that

usually, as in California, an exemplified copy of an indictment, or other judicial proceedings, may be received as evidence before the magistrate. (*California. Secs. 1548-50, 1557 Penal Code.*)

§ 728. **Expense of Extradition.**—The expense of bringing back fugitives from justice is borne by the state to which he is returned for trial, and statutory provision is usually made for the auditing of the bills therefor.

Arizona. Sec. 2369 Penal Code.

California. Sec. 1557 Penal Code.

Colorado. Sec. 1535 General Statutes, 1883.

Oregon. Sec. 1697 I Hill's Codes, 1892.

Washington. Sec. 1387 II Hill's Codes, 1891.

§ 729. **Requisites for Obtaining Requisition.**
—The following are the rules of practice adopted by a conference of the representatives of the different states, upon the subject of Requisitions. All requisitions directed to the Governor should conform to the same :

“The application for the requisition must be made or recommended by the District Attorney for the county in which the offense was committed, and must be in duplicate original papers, or certified copies thereof.

“The following must appear by the certificate of the District Attorney :

“(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in Roman capital letters; for example, JOHN DOE.

“(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this State for trial at the public expense.

"(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

"(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

"(e) If there has been any former application for a requisition for the same person, growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

"(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

"(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

"(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

"(i) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

"1. In all cases of fraud, false pretenses, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not, di-

rectly or indirectly, use the same for any of said purposes, shall be required, or a sufficient reason be given for the absence of such affidavit.

"2. Proof by affidavit of *facts and circumstances* satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

"3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

"4. If an indictment has not been found by a grand jury, the *facts and circumstances* showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a *magistrate* (a Notary Public is not a magistrate within the meaning of the statutes), and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

"5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrant must be duly certified.

"6. Upon the renewal of an application (for example: on the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted), new or certified copies of papers in conformity with the above rules must be furnished.

"7. In the case of any person who has been con-

victed of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

"8. No requisition will be made for the extradition of any fugitive except in compliance with these rules."

§ 730. **No Fee for Procuring Extradition Papers.**—"No compensation, fee or reward of any kind can be paid to or received by a public officer of this State, or other person, for a service rendered in procuring from the governor the demand for the surrender of a fugitive, or for conveying him to this State, or detaining him therein, except as provided by law." Any person violating any of these provisions is guilty of a misdemeanor. (*California. Secs. 144, 1558 Penal Code.*)

CHAPTER XXVII.

REWARDS.

- § 731. Offer of Reward Binding.
- § 732. Essentials for Recovery.
- § 733. When Reward Is Not Earned.
- § 734. Recovery by Deputy Sheriff—Public Policy.

§ 731. **Offer of Reward Binding.**—An agreement, by one who has lost property by fire or theft, to pay a certain sum to anyone who will secure the arrest and conviction of the criminal, is not a *nude pact*, but may be enforced by a person performing the service.

In such cases, the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if anyone to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until the performance, the offer may be revoked at pleasure.

Such advertisements, upon acceptance of their terms and performance of the services, become written contracts. (*Ryer vs. Stockwell*, 14 Cal. 134; *McLeod vs. Meade*, 77 Cal. 87.)

§ 732. **Essentials for Recovery.**—To entitle a person to recover a reward he must show that he knew

the reward was offered, and that he acted in reference to it, and in faith of getting it. (*Hewitt vs. Anderson*, 56 Cal. 476.)

§ 733. **When Reward Is Not Earned.**—An offer, by a party who has been robbed, of a reward for the arrest and conviction of the robbers, is not earned by one who merely communicates to the party robbed his suspicions that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly towards him, and who does not claim the reward until after the arrest and conviction of the robbers. (*Burke vs. Wells, Fargo & Co.*, 50 Cal. 218.)

Where the reward was for such information as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and conviction. The Statute of Limitations begins to run from that time, and the limitation would be the same as on a written contract. (*Ryer vs. Stockwell*, 14 Cal. 134.)

§ 734. **Recovery by Deputy Sheriff—Public Policy.**—An agreement to compensate a deputy sheriff for procuring evidence to convict for a crime committed in another county is not contrary to public policy and may be enforced. (*Harris vs. Moore*, 70 Cal. 502.)

CHAPTER XXVIII.

SEARCH WARRANTS.

- § 735. Search Warrant, Generally.
- § 736. How Served.
- § 737. By Whom Served.
- § 738. Time for Return.
- § 739. Service by Day or Night.
- § 740. Receipt for Property Taken.
- § 741. Search of Person—Lottery Tickets.

§ 735. **Search Warrant, Generally.**—A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to forthwith search the person or place named for the property specified, and to bring it before the magistrate. (*California. Sec. 1523 Penal Code.*) The powers and authority of officers under search warrants are prescribed by the statutes to which reference is made at the end of this section; but they are entirely similar in each case to those under the California procedure, which is outlined in this chapter.

Arizona. Secs. 2327-46 Penal Code.

California. Secs. 1523-37 Penal Code.

Colorado. Secs. 1491-2 Mills' Ann. Stats., 1891.

Idaho. Secs. 8390-8409 Revised Statutes, 1887.

Montana. Secs. 432-444 Criminal Practice Act.

Nevada. Secs. 4510-32 *General Statutes*, 1885.

Oregon. Secs. 1677-94 *I Hill's Codes*, 1892.

Utah. Secs. 5402-21 *Compiled Laws*, 1888.

Washington. Secs. 1383-6, 1569 *II Hill's Codes*, 1891.

§ 736. **How Served.**—"In serving a search warrant, the officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. He may also break open doors and windows to liberate a person who, having entered to aid him, is detained therein, or when necessary for his own liberation." (*California. Secs. 1531-2 Penal Code.*)

§ 737. **By Whom Served.**—It may in all cases be served by any sheriff, constable, marshal or policeman, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. (*California. Sec. 1530 Penal Code.*)

§ 738. **Time for Return.**—"A search warrant must be executed and returned within ten days after its date; after the expiration of this time, the warrant, unless executed, is void." (*California. Sec. 1534 Penal Code.*)

§ 739. **Service by Day or Night.**—The magistrate issuing a search warrant must insert a direction therein "that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night." (*California. Sec. 1533 Penal Code.*)

§ 740. **Receipt for Property Taken.**—The officer must give a receipt for the property taken to the person in whose possession it was found, and file with the return an inventory of the property taken. (*California. Sec. 1535 Penal Code.*)

§ 741. **Search of Person—Lottery Tickets.**—The Legislature has power to authorize the issuance of a warrant to search the person of an individual in a proper case. In California such power has been exercised by the enactment of Secs. 1523-42 of the Penal Code.

Under a warrant authorizing the searching of a certain person for lottery tickets, the officer was justified in carrying away tickets discovered in the room where the search was made, for the purpose of using them as evidence. After the tickets are no longer required as evidence, the owner is not entitled to have them returned to him, in a suit against a police officer having them, as they are in law not in his custody but in that of the magistrate to whom they were taken under the search warrant. (*Collins vs. Lean, 68 Cal. 284.*)

CHAPTER XXIX.

COUNTY JAIL.

- § 742. Jail, by Whom Kept and for What Used.
- § 743. Rooms Required in Jails.
- § 744. Searching for Cells, etc.
- § 745. Prisoners to be Classified.
- § 746. Prisoners Must Be Confined.
- § 747. United States Prisoners.
- § 748. When Jail of Contiguous County May Be Used.
- § 749. Removal in Case of Fire.
- § 750. Removal in Case of Pestilence.
- § 751. Service of Papers on Prisoners.
- § 752. Guard for Jail.
- § 753. Sheriff Must Receive All Persons Committed.
- § 754. Prisoners on Civil Process.
- § 755. Expense of Boarding Prisoners.
- § 756. Working of Prisoners.
- § 756a. Custody of Prisoners While Working.
- § 757. Officer Refusing to Receive Criminals.
- § 758. Prisoner Entitled to Visits of Counsel.
- § 759. Rescuing Prisoners.
- § 760. Escapes from Jail.
- § 761. Escape—Computation of Term.
- § 762. Credits Allowable to Prisoners.
- § 763. Inhumanity to Prisoners.
- § 764. Carrying Articles to Prisoners.
- § 765. Injuring Jails.

§ 742. **Jail, by Whom Kept and for What Used.**—The common jails in the several counties of

the state are kept by the sheriffs of the counties in which they are respectively situated, and are used for the detention of all persons lawfully committed thereto. (*California. Sec. 1597 Penal Code.*)

Colorado. Sec. 854 Mills' Ann. Statutes, 1891.

Montana. Sec. 854, p. 873; Sec. 1270, p. 1000, Compiled Statutes, 1887.

Nevada. Sec. 2139 General Statutes, 1885.

Utah. Secs. 107, 110, p. 280, 1 Comp. Laws, 1888.

Washington. Sec. 1198 1 Hill's Codes, 1891.

§ 743. **Rooms Required in Jails.**—"Each jail shall contain a sufficient number of rooms to allow all persons belonging to either one of the following classes to be confined separately and distinctly from other persons belonging to either of the other classes: (1) Persons committed on criminal process and detained for trial; (2) persons already convicted of crime and held under sentence; (3) persons detained as witnesses or held under civil process, or under an order imposing punishment for contempt; (4) males separately from females." (*California. Sec. 1598 Penal Code.*)

§ 744. **Searching of Cells, etc.**—All cells should be frequently searched, and mattresses and bedding thoroughly overhauled, for contraband articles. Saws, files and even ropes, are easily smuggled into a jail, despite the watchfulness of its keepers. There is no criminal so hardened in crime but that he has sympathizers who are ever ready to aid him to regain his liberty. With the more desperate classes it is a constant study of how to escape from confinement. With such prisoners the jailer must exercise constant vigilance or allow himself to be outwitted.

§ 745. **Prisoners to be Classified.**—"Persons committed on criminal process and detained for trial, persons convicted and under sentence and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room." (*California. Sec. 1599 Penal Code.*)

Utah. Secs. 109, 111, p. 280, 1 Compiled Laws, 1888.

§ 746. **Prisoners Must Be Confined.**—"A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the county jail until he is legally discharged; and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape." (*California. Sec. 1600 Penal Code.*)

§ 747. **United States Prisoners.**—"The sheriff must receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this State; provision being made by the United States for the support of such prisoner." The sheriff is answerable for such prisoner's safe keeping, in the courts of the United States, according to the laws thereof. (*California. Secs. 1601-2 Penal Code.*)

Idaho. Sec. 8529 Revised Statutes, 1887.

Montana. Sec. 1275, p. 1001, Comp. Stats., 1887.

Oregon. Sec. 1018 Hill's Codes, 1892.

Utah. Sec. 117, p. 281, 1 Compiled Laws, 1888.

§ 748. **When Jail of Contiguous County May Be Used.**—"When there is no jail in the county, or

when the jail becomes unfit or unsafe for the confinement of prisoners, the Superior Court judge may designate the jail of a contiguous county for the confinement of the prisoners of his county, or of any of them." (*California. Sec. 1603 Penal Code.*)

Nevada. Sec. 2146 General Statutes, 1885.

§ 749. **Removal in Case of Fire.**—"When a county jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff or jailer must remove them to a safe and convenient place, and there confine them as long as it may be necessary to avoid the danger." (*California. Sec. 1607 Penal Code.*)

Nevada. Sec. 2146 General Statutes, 1885.

§ 750. **Removal in Case of Pestilence.**—When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, the sheriff may remove the prisoners upon an order of the Superior judge. (*California. Sec. 1608 Penal Code.*)

Nevada. Sec. 2146 General Statutes, 1885.

§ 751. **Service of Papers on Prisoners.**—"A sheriff or jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner, with a note thereon of the time of its service. For a neglect to do so he is liable to the prisoner for all damages occasioned thereby." (*California. Sec. 1609 Penal Code.*)

Idaho. Sec. 8537 Revised Statutes, 1887.

Utah. Sec. 112, p. 280, 1 Compiled Laws, 1888.

§ 752. **Guard for Jail.**—"The sheriff, when necessary, may, with the assent in writing of the Superior

Court judge, or, in a city, of the mayor thereof, employ a temporary guard for the protection of the county jail, or for the safe keeping of prisoners, the expenses of which are a county charge." (*California. Sec. 1610 Penal Code.*)

Utah. Sec. 113, p. 280, 1 Compiled Laws, 1888.

§ 753. **Must Receive All Persons Committed.**

"The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation, to be determined by the Board of Supervisors." (*California. Sec. 1611 Penal Code.*)

Idaho. Sec. 8539 Revised Statutes, 1887.

Utah. Sec. 108, p. 280, 1 Compiled Laws, 1888.

§ 754. **Prisoners on Civil Process.**

"Whenever a person is committed on civil process, except when the people of the state are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing and bedding, or to detain such person any longer than these expenses are provided for. But this does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or orders of court." (*California. Sec. 1612 Penal Code.*)

§ 755. **Expense of Boarding Prisoners.**

—The Board of Supervisors shall allow to the sheriff his necessary expenses for boarding prisoners at the county jail, and shall fix the price at which they shall be boarded, except when otherwise provided by law. (*California.*

Secs. 216, 230, Co. Govt. Bill; Stats. 1893, pp. 507, 511.)

When the statute allows to the sheriff, for feeding the prisoners, "a reasonable compensation, to be determined by the Board of Supervisors" (*Sec. 1611 Penal Code, Cal.*), action by the Supervisors does not preclude the officer from bringing suit against the county in case he is dissatisfied with the amount allowed by the Board. (*Fulkerth vs. County of Stanislaus, 67 Cal. 334.*)

Montana. Sec. 1270, p. 1000, Comp. Stat., 1887.

Utah. Secs. 114-5, p. 281, 1 Compiled Laws, 1888.

§ 756. **Working of Prisoners—Custody.**—"Persons confined in the county jail under a judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the Board of Supervisors to perform labor on the public works or ways in the county." (*California. Sec. 1613 Penal Code.*)

Arizona. Sec. 521 Revised Statutes, 1887.

Montana. Secs. 1280-4, pp. 1002-3, Compiled Statutes, 1887.

Nevada. Secs. 2148-54 General Statutes, 1885.

Oregon. Secs. 1960-2 Hill's Codes, 1892.

Utah. Sec. 187, Sub. 28, Compiled Laws, 1888.

§ 756a. **Custody of Prisoners While Working.**

Under two statutes, one requiring that the sheriff must "take charge of and keep the county jail and the prisoners therein," and the other authorizing the working of prisoners upon public roads, "under the direction of some responsible person," the sheriff cannot refuse to turn over prisoners to the overseer appointed by the supervisors under the latter act on the ground

that he is their only legal custodian. (*Hicks vs. Folks*, 97 Cal. 241.)

§ 757. **Officer Refusing to Receive Criminals.**—"Every sheriff, keeper of a jail, constable or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Sec. 142 Penal Code.*)

Colorado. Sec. 1292 Mills' Ann. Statutes, 1891.

Idaho. Sec. 6510 Revised Statutes, 1887.

Montana. Sec. 128, p. 534, Compiled Statutes, 1888.

Nevada. Sec. 1702 General Statutes, 1885.

Utah. Sec. 4432 Compiled Laws, 1888.

Washington. Sec. 177 Penal Code.

§ 758. **Prisoner Entitled to See Counsel.**—A prisoner is entitled to receive visits from his attorney at all reasonable times.

Colorado. Sec. 210 Mills' Ann. Statutes, 1891.

§ 759. **Rescuing Prisoners.** "Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody," is punishable under Sec. 101 of the Penal Code of California. See also *Sec. 764, post.*

Montana. Secs. 121-2, 125, pp. 532-3, Compiled Statutes, 1887.

Oregon. Sec. 1837 Hill's Codes, 1892.

Utah. Sec. 4411 Compiled Laws, 1888.

§ 760. **Escapes from Jail.**—"Every prisoner confined in any jail who escapes or attempts to escape therefrom, is guilty of a misdemeanor." (*California. Sec. 107 Penal Code.*)

"Every keeper of a prison, sheriff, deputy sheriff, constable or jailer or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in the state prison not exceeding ten years, and fine not exceeding ten thousand dollars." (*California. Sec. 108 Penal Code.*)

"Every person who willfully assists any prisoner confined in any prison or in the lawful custody of any officer or person to escape, or in an attempt to escape, from such prison or custody," is punishable by imprisonment in the state prison not exceeding ten years, and fine not exceeding ten thousand dollars. (*California. Sec. 109 Penal Code.*)

Colorado. Secs. 1284-91 Mills' Ann. Stats. 1891.

Idaho. Sec. 6455 Revised Statutes, 1887.

Montana. Secs. 123, 126-7, pp. 533-4, Compiled Statutes, 1887.

Nevada. Secs. 1700 1, 2133, 4748, General Statutes, 1885.

Oregon. Secs. 1001-3, 1833-5, Hill's Codes, 1892.

Utah. Sec. 4413 Compiled Laws, 1888.

Washington. Secs. 175-8, Penal Code.

§ 761. **Escape Computation of Term.**—An unauthorized release or departure of a prisoner without discharge in due course of law is, in effect, a technical escape, and the time of his absence cannot be computed as any part of the term of imprisonment. (*Ex parte Vance, 90 Cal. 208.*)

§ 762. **Credits Allowable to Prisoners.** By the provisions of Sec. 1614 of the Penal Code of California, as amended in 1893, "for each month in which

the prisoner appears by the record to have given a cheerful and willing obedience to the rules and regulations, and that his conduct is reported by the officer in charge of the jail to be positively good, five days shall, with the consent of the Board of Supervisors, be deducted from his term of sentence."

Nevada. Sec. 2154 General Statutes, 1885.

§ 763. **Inhumanity to Prisoners.**—"Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding \$2,000, and by removal from office." (*California. Sec. 147 Penal Code.*)

Idaho. Sec. 6514 Revised Statutes, 1887.

Montana. Sec. 115, p. 530, Comp. Stats., 1887.

Nevada. Sec. 1697 General Statutes, 1885.

Utah. Sec. 4435 Compiled Laws, 1888.

§ 764. **Carrying Articles to Prisoners.**—"Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein," is punishable by imprisonment in the State prison not exceeding ten years and fine not exceeding \$10,000. (*California. Secs. 108-110 Penal Code.*) See also *Sec. 759, ante.*

Montana. Secs. 124, 126, p. 533, Comp. Stats., 1887.

§ 765. **Injuring Jails.**—"Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding \$10,000 and by imprisonment in the State prison not exceeding five years." (*California. Sec. 606 Penal Code.*)

CHAPTER XXX.

FEES AND SALARIES.

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- § 789. Bill against County to be Itemized.
- § 790. Fraudulent Bills against County.
- § 791. Allowance of Claims against the County.
- § 792. No Fees in Habeas Corpus Cases.

§ 766. **Fees and Salaries, Generally.**—The various statutes regulating fees chargeable by and salaries allowed to sheriffs and constables in the states and territories to which this work is particularly applicable, are so numerous that even a reference to the statutes applicable to the several counties—much less the quoting of them at length—is precluded by the necessary limitations upon such a work as the present. In some states, as in California, a different fee bill exists for nearly every county; an equal diversity is found in the salary list, and both are the subject of frequent legislative change. Every officer, however, is presumed to be familiar with the fee bill of his own county, and, in each case, the officer will find the appropriate statute easily accessible.

In California the sheriff of each county receives a fixed salary, and is required to pay into the county treasury all fees collected by him. Salaries are fixed by the County Government Bill of 1893 (*Statutes 1893, p. 346*), or by the Bill of 1883 as amended in 1889 (*Statutes 1889, pp. 281, 297*), while the fees are regulated either by the County Government Bill, *ante*, or by various statutes, to which a full reference will be found in the “INDEX TO LAWS OF CALIFORNIA” (published by the State in 1894), under the title “Fees.”

§ 767. **Salaries of Deputies.**—Where the sheriff is allowed by law a salary in gross for all services rendered by him and his deputies in performing the official duties of sheriff, as in California, he may of course make his own terms as to the salaries to be paid to his deputies, except as to salaries of additional deputies, fixed by law and payable out of the county treasury.

For a reference to the statutory authority for addi-

tional deputies in California, see "INDEX TO LAWS OF CALIFORNIA," title "Sheriff-Deputies."

§ 768. **Deputies for New Courts.**—When additional deputies are appointed, as authorized upon increase of the number of Superior judges, the salary of each deputy is \$125 per month. (*California. Statutes 1893, p. 507.*)

§ 769. **Must Require Prepayment of Fees.**—The sheriff is not to perform any official services, except in cases of *habeas corpus*, unless upon the prepayment of the fees prescribed for such services; and on such payment, he must perform the services required. (*California. Sec. 223 Co. Govt. Bill, Statutes 1893, p. 510.*)

The statute which declares that "any officer may refuse to perform any services in a civil action or proceeding, until the fee for such service is paid," is not to be construed as prohibiting the officer from performing the service without prepayment of fees, but as permissive merely, leaving the alternatives of cash in advance or credit to his own election. If, when services are demanded of an officer, he fails to demand his fees in advance, his obligation to perform the duty required is the same as it would be if the fees were prepaid or tendered in advance. (*Lick vs. Madden, 25 Cal. 202.*)

§ 770. **Receipt for Fees to be Given.**—Upon receiving any fees for official duty or service, the sheriff "may be required by the person paying the same to make out in writing, and deliver to such person, a particular account of such fees, specifying for what they respectively accrued, and shall receipt the same; and if he

refuse or neglect to do so when required, he shall be liable to the party paying in treble the amount so paid." (*California. Sec. 224 Co. Govt. Bill, Statutes 1893, p. 510.*)

§ 771. **Fee Book to be Kept.**—The sheriff "must keep a fee book, open to public inspection during office hours, in which must be entered, at once and in detail, all fees or compensation of whatever nature, kind or description, collected or chargeable. On the first Monday of each and every month, he must add up each column in his book to the first day of the month, and set down the totals. On the expiration of his term, he must deliver all fee books kept by him to the County Auditor." (*California. Sec. 218 Co. Govt. Bill, Statutes 1893, p. 509.*)

§ 772. **Prepayment of Expense of Publication.**—"When, by law, any publication is required to be made by an officer, of any suit, process, notice, order or other paper, the costs of the same shall be first tendered by the party, if demanded, for whom such order of publication was granted, before the officer shall be compelled to make such publication." (*California. Statutes 1869-70, p. 180, Sec. 37.*)

§ 773. **Mileage—How Computed.**—When the statute allows to the officer certain mileage "for every mile necessarily traveled, *in going only*, in executing any warrant of arrest, subpoena or venire, . . . taking prisoners before a magistrate," the execution of the warrant of arrest and the taking before a magistrate are "separate and distinct acts to be done by the officer," and he is entitled to mileage both ways. (*Cunningham vs. San Joaquin Co., 49 Cal. 323; 82 Cal. 187; 98 Cal. 245.*)

§ 774. **Keeper's Fees to be Allowed.**—When the statute provides, as in California, that “for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution or other process,” the sheriff shall be entitled to “such sum as the Court may order; *provided* that no more than three dollars *per diem* shall be allowed to a keeper,” the sheriff is not entitled to any fees for such services unless the Court makes an order allowing them. (*Shumway vs. Leakey*, 73 Cal. 260.) See also *Secs. 301-3, ante*.

The sheriff is entitled to collect for his expenses in keeping property under levy only for such period as the property was lawfully in his possession. (*Sam Yuen vs. McMann*, 99 Cal. 497.)

§ 775. **Officer's Lien for Fees.**—A statute which provides that the officer may retain attached property until his fees are paid, in effect gives him a lien for their amount, which he may enforce “in any suitable mode.” (*Perrin vs. McMann*, 97 Cal. 52.)

§ 776. **Change of Sheriffs—Fees on Release.**—When a sheriff goes out of office, holding attached property in his possession, the party wishing to procure a release must seek him and pay his fees in full up to the time of the release. (*Perrin vs. McMann*, 97 Cal. 52.)

§ 777. **Fees of Coroner or Elisor.**—“Whenever process is executed or any act performed by a coroner or elisor, in the cases provided by law in that behalf, he shall be entitled to a reasonable compensation, to be fixed by the Court.” (*California. Sec. 109 Co. Govt. Act; Statutes 1893, p. 374.*)

§ 778. **Fees of Citizen for Service.**—When summons or subpœna is served in California by a person other than the sheriff, under authority of the statute, such person shall be allowed such sum as the Court may think proper, not exceeding the amount allowed sheriffs by law. (*Statutes 1891, p. 56.*)

§ 779. **Penalty for Receiving Illegal Fees.**—“Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.” (*California. Sec. 70 Penal Code.*)

The Board of Supervisors, upon receiving a certified copy of the record of conviction of an officer for receiving illegal fees, must declare his office vacant. (*California. Sec. 226 Co. Govt. Bill, Statutes 1893, p. 510.*)

§ 780. **Settlement before Drawing Salary.**—In California the sheriff is not entitled to, and the auditor must not draw his warrant for, monthly salary until he has produced the certificate of the county treasurer, showing that he has paid into the treasury the fees allowed by law for the preceding month, except such fees as are a charge against the county, accompanied by a statement of the aggregate amount thereof, as shown by the fee book, duly verified by him by his affidavit in the form prescribed by law. (*California. Secs. 217, 219, 222 Co. Govt. Bill, Statutes 1893, pp. 508-510.*)

§ 781. **Division of County—Salaries.**—“When the population of any existing county shall have been reduced, by reason of the creation of any new county

from the territory thereof, below the class and rank first assumed, . . . the salary of county officers, the salaries of their deputies, clerks or assistants, and the number of such deputies, clerks or assistants, shall in no way be affected by reason of such division of the county or order of the Board of Supervisors for the term for which they were elected and shall have qualified. . . . In all newly created counties, for the purpose of fixing the salaries and fees of county and township officers, the Board of Commissioners appointed to organize said new county, and if no Commissioners be appointed, then the Board of Supervisors of said new county, shall classify said new county." (*California. Sec. 235 Co. Govt. Bill, Statutes 1893, p. 512.*)

§ 782. **Salary during Erroneous Suspension.**

—Provision is sometimes made by statute for the removal of public officers for willful misconduct. (See *Secs. 72-73, 75, ante.*) After judgment of removal and reversal of the same on appeal, the officer is entitled to his salary during the time of his suspension by the erroneous judgment, even though another person has been paid for performing the duties of the office in the meantime. (*Ward vs. Marshall, 96 Cal. 155.*)

§ 783. **Conveying Prisoners and Insane Persons.**

The sheriff is entitled "to receive and retain for his own use \$5.00 *per diem* for conveying prisoners to and from the state prisons and for conveying persons to and from the insane asylums or other state institutions, also all expenses necessarily incurred in conveying insane persons to and from the insane asylums, and in conveying persons to and from the state

prisons, which *per diem* and expenses shall be allowed by the Board of Examiners and collected from the state." (*California. Statutes 1893, p. 507; Statutes 1889, p. 200.*)

When the salary of the sheriff is fixed by law, "in full compensation for all services rendered," etc., and he is required to pay into the county treasury all "fees . . . of whatever kind or nature," a statute allowing him, out of the State treasury, expenses and *per diem* for transportation of prisoners and insane persons does not authorize him to appropriate such sums to his own use in addition to his salary unless expressly authorized. (*Santa Clara Co. vs. Branham, 77 Cal. 592.*) Since the decision in this case, the California statute has been amended as above stated, so as to allow all such sums to the sheriff "for his own use."

§ 784. **Sheriff Entitled to Salvage.**—"Sheriffs and all persons employed by them or aiding in the recovery and preservation of wrecked property, are entitled to a reasonable allowance as salvage for their services, and to all expenses incurred by them in the performance of such services, out of the property saved; and the officer having the custody of such property must detain it until the same are paid or tendered. But the whole salvage claimed must not exceed one-half of the value of the property or proceeds on which it is charged; and every agreement, order or adjustment allowing a greater salvage is void, unless ordered and allowed by the county judge." (*California. Sec. 2404 Political Code.*)

§ 785. **Expenses in Pursuit of Criminals.**—"The Board of Supervisors shall allow to the sheriff his necessary expense for pursuing criminals or transacting

any criminal business without the boundaries of his county." (*California. Statutes 1893, p. 507.*)

§ 786. **No Mileage for Unsuccessful Pursuit.**—Under a statute fixing the mileage of the sheriff in criminal cases and providing that the supervisors shall allow him "his necessary expenses for pursuing criminals," he is not entitled to collect mileage for the distance traveled in an unsuccessful search for persons charged with crime, although the persons are subsequently found and arrested by him upon a second search, "though possibly he might rightly claim pay for his necessary expenses." (*Overall vs. Tulare Co., 100 Cal. 61.*)

§ 787. **Increase of Compensation During Term.**—Article II, Sec. 9, of the Constitution of California provides that "the compensation of any county, city, town or municipal officer shall not be increased after his election, or during his term of office;" but by this provision it is only the compensation for services to be rendered, and not traveling and other incidental expenses of the office, that are forbidden to be raised. (*Kirkwood vs. Soto, 87 Cal. 394.*)

§ 788. **Salaries of Constables Not to be Fixed by Supervisors.**—A constitutional provision for the regulation by the Legislature of the compensation of officers therein named is mandatory, and such regulation cannot be delegated to the Board of Supervisors, *e. g.*, the fixing of the salaries of constables in California. (*People ex rel. Atkinson vs. Johnson, 95 Cal. 471.*)

§ 789. **Bill against County to be Itemized.**—"The Board of Supervisors must not hear or consider

any claim in favor of any person, corporation, company or association against the county, nor shall the Board credit or allow any claim or bill against the County or District Fund, unless the same be itemized, giving names, dates and particular services rendered; character of process served; upon whom; distance traveled; where and when; character of work done; number of days engaged; materials furnished; to whom; and quantity and price paid therefor, duly verified as to its correctness, and that the amount claimed is justly due, is presented and filed with the clerk of the Board within a year after the last item of the account or claim accrued." (*California. Sec. 41 Co. Govt. Bill, Stats. 1893, p. 363.*)

§ 790. **Fraudulent Bills against County.**—If the sheriff present to the Board of Supervisors any false or fraudulent claim, bill, account, voucher or writing, he is guilty of a felony. (*California. Sec. 72 Penal Code.*)

§ 791. **Allowance of Claims against the County.**—All accounts of the sheriff for services performed by him and chargeable against the county, must be presented to and allowed by the Board of Supervisors in the same manner as other claims. (*California. Stats. 1893, p. 511.*)

§ 792. **No Fees in Habeas Corpus Cases.**—It is usually provided by statute that no fees are to be collected for the service of any process in habeas corpus, or no provision is made in the respective fee bills for the collection of any fees.

California. Sec. 4333 Penal Code; Sec. 228 Co. Govt. Bill.

Idaho. Sec. 2138 Rev. Stats. 1887.

CHAPTER XXXI.

SHERIFFS' AND CONSTABLES' FORMS.

NOTE.—These forms are adapted to the practice in California. In other states care should be taken to make such changes as may be necessary to conform them to the local statutes. A full list and index of these forms will be found at the end of this volume.

§ 793. **Return on Summons—One Defendant.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 18.., and personally served the same upon John Doe, the within named defendant, by delivering to and leaving with said defendant, personally, in the County of, on the day of, 18.., a copy of said summons, attached to a copy of the complaint referred to in said summons.

Dated, 18...

....., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$.....

NOTE.—Although the language of the statute does not in express terms declare that the copy of summons delivered to a

defendant must be left with him, yet it is obvious that the spirit of the law would be violated if the copy were immediately taken from the defendant by the person making the service; and it is therefore deemed best that the return of service should show that, not only the letter of the law, but its intent, has been complied with.

§ 794. **Return on Summons—Several Defendants.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 18.., and personally served the same upon the hereinafter named defendants by delivering to and leaving with each of said defendants, personally, in the County of, at the time set opposite their names, respectively, a copy of said summons attached to a copy of the complaint referred to in said summons.

Names of Defendants Served. Time of Service.

.....
.....
.....

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.....

§ 795. **Return on Summons—Some Defendants Not Served.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 18.., and personally served the same

upon John Doe, one of the within named defendants, by delivering to and leaving with said John Doe, personally, in the County of, on the day of, 18.., a copy of said summons, attached to a copy of the complaint referred to in said summons.

And I further certify that, after due search and diligent inquiry, I have been unable to find the within named Sally Maguzelum in County.

Dated,, 18..

., Sheriff.

., Deputy Sheriff.

Sheriff's Fees, \$.

§ 796. **Return on Summons Served on Local Corporation.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 18.., and personally served the same upon The Mud Springs Clay Bank, a corporation, by delivering to and leaving with Simon Sudds, the president of said The Mud Springs Clay Bank, a corporation, in the County of, on the day of, 18.., a copy of said summons; and that the copy so delivered to and left with said Simon Sudds, as president of, said defendant, was attached to a copy of the complaint referred to in said summons.

Dated,, 18..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

NOTE.—In California, the summons, in a suit against a corporation formed under the laws of the State, must be delivered to the president or other head of the corporation, secretary, cashier, or managing agent thereof. The teller of a bank is not the managing agent. If the suit is against a foreign corporation, or a non-resident joint stock company or association, the summons must be delivered to the managing or business agent, cashier or secretary. (*California. Sec. 411 Code Civil Procedure.*) See also Secs. 104-6, *ante*.

§ 797. **Return on Summons Served on Minor and Administratrix.** (*California.*) See also Secs. 104, 107, *ante*.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 18.., and personally served the same on the day of, 18.., on Ellen Brown, and also on Ellen Brown as administratrix of the estate of James Brown, deceased, and also on Nellie B. Brown, a minor under the age of fourteen years, and also on Kate T. Brown, defendants named in said summons, by delivering to and leaving with said Ellen Brown, personally, and in her own right, in said County, a copy of said summons, with a copy of the complaint in the action named therein, and by delivering to and leaving with said Ellen Brown as administratrix of the estate of James Brown, deceased, personally, in said county, a copy of said summons, and by delivering to and leaving with said Ellen Brown, personally, as the mother of defendant Nellie B. Brown, a minor under the age of fourteen years, in said county, a copy of said summons, and by, at the same time, delivering to and leaving with said Nellie B. Brown, a minor, as aforesaid, personally, a copy of said summons, and by deliv-

§§ 798, 799 SHERIFFS' AND CONSTABLES' FORMS.

ering to and leaving with the defendant, Kate T. Brown, personally, in said county, a copy of said summons.

Dated, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 798. **Return on Summons—Defendant of Unsound Mind.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 18... and personally served the same upon John Doe, the within named defendant, by delivering to and leaving with said John Doe, personally, in the County of, on the day of, 18... a copy of said summons, and by delivering to and leaving with Richard Roe, guardian of said John Doe, personally, in the County of, on the day of, 18... a copy of said summons; and that the copy so delivered to and left with said John Doe was attached to a copy of the complaint referred to in said summons.

Dated, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 799. **Return on Summons Where Defendant Cannot Be Found.**

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby

certify that I received the within summons on the day of, 18.., and that after due search and diligent inquiry I have been unable to find the within named defendant, Peter Jones, in County.

Dated, 18...

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 800. **Return of Summons by Person Other Than Officer.** (*California.*) See also Secs. 794-8, *ante*.

In the Superior Court, County of, State of
 James Boggs)
 vs.
 Richard Roggs.)

Roothog R. Dye, being duly sworn, deposes and says: That he is, and at all times mentioned herein was, over the age of eighteen years, and not a party to the within action; that he received the within annexed summons on the day of, 18.., and personally served the same upon Richard Roggs, the within named defendant, on the day of, 18.., by delivering to and leaving with said Richard Roggs, said defendant, personally, in the County of, a copy of said summons, attached to a copy of the complaint referred to in said summons.

Subscribed and sworn to }
 before me, this }
 day of, 18...

ROOTHOG R. DYE.

.

.

§ 801. **Return on Justice's Court Summons.**
(*California.*)

County of , }
. . . . Township. } ss.

I hereby certify that I received the within summons on the day of , 18 . . , and personally served the same by delivering to and leaving with , the defendant named herein, personally, a true copy of this summons, attached to a true copy of the complaint herein, in Township, County, this day of , 18 . . .

. , Constable.

By , Deputy.

Fees, \$.

§ 802. **Return on Justice's Court Summons from Another County.**

Sheriff's Office, }
County of } ss.

I hereby certify that I received the within summons and certificate of the County Clerk of the County of , on the day of , 18 . . ; that at the said County of , on this day of , 18 . . , I personally served said summons on , the within named defendant, by delivering to and leaving with him, personally, a copy of said summons and clerk's certificate attached thereto, and a copy of the complaint referred to in said summons, also attached thereto.

Dated , 18 . . .

. , Sheriff.

By , Deputy Sheriff.

Sheriff's Fees, \$.

§ 803. **Return on Subpœna in Civil Cases.**

Sheriff's Office, }
 County of } ss.

I,, Sheriff of the County of, hereby certify that I served the within subpœna, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the day of, A. D. 18.., at the County of ... , to wit:, who did not demand fees, and, who demanded and received fees, \$.....

Dated,, 18....

Sheriff's Fees:, Sheriff.

Service, \$..... By, Deputy Sheriff.

Mileage, \$.....

Total, \$.....

§ 804. **Return by Citizen on Subpœna—Civil Case.** (*California.*)

State of, }
 County of } ss.

....., being duly sworn, says: That he served the within subpœna, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the day of, A. D. 18.., at the said County of, to wit:, who did not demand fees, and, who demanded and received fees, \$.....

Subscribed and sworn to before me, }
 this day of, A. D., 18... }

.....

.....

§§ 805, 806 SHERIFFS' AND CONSTABLES' FORMS.

§ 805. **Return on Subpœna in Criminal Case.**
(*California.*)

State of }
County of } ss.

I,, Sheriff of the County of, hereby certify that I served the within subpœna, on the day of , 18. . . , on John Doe, Richard Roe, and Jane Jenks, being the witnesses named in said subpœna, at the County of , by showing the original to said witnesses, personally, and informing them of the contents thereof.

Dated, , 18. . .

. , Sheriff.

By , Deputy Sheriff.

Sheriff's Fees, \$.

§ 806. **Return on Attachment of Personal Property.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within and hereunto annexed writ of attachment, by me received on the day of , 18. . . , I did, on the day of , 18. . . , attach the following described personal property in the possession of , viz.: (description of property), and attached the same by taking into my custody (*and putting a keeper in charge*).

Dated, , 18. . .

. , Sheriff.

By , Deputy Sheriff.

Sheriff's Fees, \$. . .

§ 807. **Return on Attachment—Undertaking Given.** (*California.*)

Sheriff's Office, }
County of } ss.

I hereby certify that I received the within writ of attachment on the day of, A. D. 18.., and the defendant having given me a bond, as required in said writ, in an amount sufficient to satisfy the demand, besides costs, I herewith return this writ of attachment without further service.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$...

§ 808. **Return on Attachment of Real Estate Standing in Defendant's Name—Property Occupied.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the hereunto annexed writ of attachment on the day of, A. D. 18.., and, by virtue of the same, did on the day of, A. D. 18.., attach all the right, title, claim and interest of, defendant (or either of them), of, in and to the following described real estate, situated in said County of, and State of, to wit: (description of the property). Said real estate standing on the records of said county in the name of, was attached as follows: By filing with the recorder of said County of, on the day of, A. D. 18.., a copy of the writ, together with a description of the property

attached, and a notice that it is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property.

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 809. **Return on Attachment of Real Estate Standing in Defendant's Name—No Occupant.**
(*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the hereunto annexed writ of attachment on the day of, A. D. 18.., and, by virtue of the same, did on the day of, A. D. 18.., attach all the right, title, claim and interest of, defendant (or either of them), of, in and to the following described real estate, situated in said County of, State of, to wit: (description of the property). Said real estate standing on the records of said county in the name of, was attached as follows: By filing with the Recorder of said County of, on the day of, A. D. 18.., a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by posting a similar copy of the writ, description and notice, in a conspicuous place on the property attached, there being no occupant.

Dated, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 810. **Return on Attachment of Real Estate Standing in Name of Person Other Than Defendant.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the hereunto annexed writ of attachment on the ... day of, A. D. 18..., and, by virtue of the same, did, on the ... day of, A. D. 18..., attach all the right, title, claim and interest of, defendant.. (or either of them) of, in and to the following described real estate, situated in said County of, and State of, to wit: (description of the property). Said real estate standing on the records of said county in the name of John Doe, was attached as follows: By filing with the Recorder of said County of, on the ... day of, A. D. 18..., a copy of the writ, together with a description of the property attached, and a notice that all the right, title and interest of, said defendant, standing on the records of said county in the name of John Doe is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property (*or as the case may be*, posting a similar copy of the writ, description, and notice in a conspicuous place on the property attached, there being no occupant); and by delivering to and leaving with said John Doe a similar copy of the writ, description and notice.

Dated,, 18...

....., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$.....

NOTE.—When the property attached stands on the records in the name of a person other than a defendant, a copy of the writ,

description and notice must be left with such other person or his agent, if known and within the county, or at the residence of either, if within the county. If such other person or his agent, nor the residence of either, cannot be found, the return should state the fact that, "after due search and diligent inquiry I have been unable to find said John Doe, nor any agent of his, nor any residence of either in county." (*California. Sec. 542 Code Civil Procedure.*)

§ 811. Return on Garnishment on Individual with Statement of Garnishee. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify and return that I received the hereunto annexed writ of attachment on the day of , 18. . , and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of John Jenks, by delivering to and leaving with said John Jenks, personally, in County, on the day of , A. D. 18. . , a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but the sheriff of County, or someone legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which I received the following answer:

"
vs. }
. }

To notice of garnishment and demand for a statement served on me, this day of , A. D. 18. . ,

by the Sheriff of County, under and by virtue of an issued in the above entitled cause, my answer is that I am indebted to, said defendant, in the sum of dollars, and that I have in my possession and under my control personal property belonging to said defendant, to wit: (description).

(Signed)"

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

§ 812. Return on Garnishment on Individual Who Made No Statement.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify and return that I received the hereunto annexed writ of attachment on the day of, 18.., and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named or either of them, in the possession or under the control of Jacob Jones, by delivering to and leaving with said Jacob Jones, personally, in the County of, on the day of, 18.., a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but the sheriff of County, or someone legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which said

Jacob Jones has failed, neglected and refused to answer.

Dated,, 18...

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 813. Return on Garnishment on Corporation. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify and return that I received the hereunto annexed writ of attachment on the day of, 18.., and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of The First National Bank of Tar Flat, by delivering to and leaving with Oliver Twist, president of said The First National Bank of Tar Flat, personally, in the County of, on the day of, A. D. 18.., a copy of said writ of attachment, with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but the Sheriff of County, or someone legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which I received the following answer: (answer—see Sec. 811, *ante*).

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 814. **Return on Execution—Levy and Sale of Personal Property.** (*California.*)

State of , }
County of } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the day of , A. D. 18.., I did, on the day of , A. D. 18.., levy upon the personal property hereinafter described, and noticed the same for sale as the law directs (by posting written notice of the time and place of sale), particularly describing the property, for days successively, in three public places of the township or city where said property was sold, and on , the day of , A. D. 18.., at o'clock, .. M. of said day, (place of sale), in said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, for United States gold coin, the property described: (description). And sold the whole of the same in separate parcels to various purchasers for the sum of dollars, in United States gold coin, said purchasers being the highest bidders, and said sum being the highest bid, in the aggregate, for the same; and I have given such purchaser, , a certificate of said sale. (Here state satisfaction of the judgment, or otherwise, as indicated in form of return on levy and sale of real estate. See Sec. 815, *post.*)

And I further certify that I deducted from the said sum of \$. . . . , my fees, commission and expenses, amounting to the sum of \$. . . . , leaving a net balance

of \$...., which I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

§ 815. Return on Execution—Levy and Sale of Real Estate. (*California.*)

State of, }
County of, } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the day of, A. D. 18.., I did, on the day of, A. D. 18.., levy upon the lands hereinafter described, and noticed the same for sale as the law directs (by posting written notice of the time and place of sale, particularly describing the property, for twenty days successively in three public places of the township or city where said property is situated, and also where said property was to be sold, and publishing a copy thereof once a week for the same period in the, a newspaper published in said County of), and on, the day of, A. D. 18.., at o'clock .. M. of said day, in front of the Court House door of said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, for United States gold coin, the property described: (description). And sold the whole of the same to, for the sum of dollars, in United States gold coin, said being the highest bidder, and said sum being the highest bid for the same; and I have given said purchaser,, a certificate of said sale, and have filed

a duplicate thereof for record with the Recorder of said County of; and I herewith return said writ fully satisfied. (If the proceeds of sale do not satisfy the judgment, omit the last clause to that effect, and state that, "after due search and diligent inquiry, I have been unable to find any other property belonging to the within named defendants, or either of them, not exempt from execution, in County, out of which to make the remainder of said judgment, or any part of such remainder, and herewith return said writ partly satisfied, to wit: in the sum of \$. . . .")

And I further certify that I deducted from the said sum of \$. . . ., my fees, commission and expenses, amounting to the sum of \$. . . ., leaving a net balance of \$. . . ., which I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

Dated,, 18. . .

. . . ., Sheriff.

By, Deputy Sheriff.

§ 816. **Return on Foreclosure.**

Sheriff's Office,)
County of) ss.

I,, Sheriff of the County of, do hereby certify: That by virtue and in pursuance of the annexed order of sale and decree of foreclosure and sale, I advertised the property described as follows, to wit: (description), to be sold by me in front of the Court House door in the City of, County of, on the day of, A. D. 18. ., at o'clock . . M.; that previous to said sale I posted written notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property was

to be sold; and also caused due and legal written notice thereof to be published once a week for the same period, preceding said sale, in the, a newspaper published in the County of, and that on . . . , the day of, 18.., the day on which said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and exposed the said premises for sale in parcel at public auction, according to law, to the highest bidder for cash when, being the highest bidder therefor, the said premises were struck off by me to the said, for the sum of dollars, in United States gold coin, which was the whole price bid, and which I acknowledge to have received; and that I delivered to said purchaser a certificate of said sale, and filed a duplicate thereof in the office of the County Recorder of the said County.

And I further certify that I deducted from the said sum of \$. . . . my fees, commission and expenses, amounting to the sum of \$. . . ., leaving a net balance of \$. . . ., which net balance I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

(Here state the satisfaction of judgment or amount of deficiency, as the case may be. See Sec. 815, *ante*.)

Dated,, 18..

., Sheriff,

By, Deputy Sheriff.

§ 817. Return on Replevin—Property Delivered to Plaintiff. (*California*.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return, that on the day of, 18..,

I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession of the same (or all thereof to be found in my county), to wit: (description of property taken), and at the same time I delivered to the defendant, Jonathan Wild, a copy of the within affidavit and order, and undertaking duly approved by me, and defendant having failed to except to the surety therein, and also having omitted to require a return of said property, and no other person than the defendant having made claim thereto, I did at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to wit: on the day of, 18.., deliver the property so taken to the plaintiff, as by said order I am commanded.

Dated,, 18..

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 818. Return on Replevin—Property Redelivered to Defendant. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return, that on the day of, 18.., I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession of the same (or all thereof to be found in my county), to wit: (description of property taken), and at the same time I delivered to the defendant, Jonathan Wild, a copy of the within affidavit and order and undertaking, duly approved by me,

and the defendant not having excepted to such surety, claimed the redelivery of said property by giving me an undertaking in due form, and the sureties thereon having justified, and no other person having made claim to said property in due form of law, I redelivered the said property to the defendant.

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 819. Return on Writ of Restitution.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within writ of restitution, by me received on the day of, 18.., I served the same on the day of, 18.., by placing the within named in quiet and peaceable possession of the lands and premises therein described. (I further certify that after due search and diligent inquiry I have been unable to find any property belonging to the within named defendant, in County, not exempt from execution, out of which to make the within money judgment, or any part thereof, and I herewith return said writ without further service, fully satisfied as to the plaintiff's possession of the lands and premises therein described, and wholly unsatisfied as to said money judgment.)

Dated,, 18...

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$.

NOTE.—If any money is made by levy and sale, or otherwise, the return as to the money judgment will be the same as in return on writs of execution. If the officer put the plaintiff's agent in possession, the return should show that the writ was served "by placing the within named plaintiff, by his agent, John Roe, in quiet and peaceable possession," etc.

§ 820. Return on Writ of Restitution—Not Served, Strangers in Possession.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the within hereunto annexed writ of restitution on the day of, 18.., and that on the day of, 18.., I proceeded to the premises therein described for the purpose of serving said writ, and that neither H. F. Larabee, the within named defendant, nor any agent of said Larabee, was then or has been since in the possession of said premises; and that said premises were in the possession of and occupied by L. H. Brown, who then and there claimed possession thereof as heir of George Brown, deceased, owner in fee simple of said premises, and also claimed possession of said premises as executor of the last will of George Brown, deceased, owner in fee simple of said premises; and said L. H. Brown, as such executor, claimed possession and title to the said premises by title superior to and entirely independent of any claim or title or possession of plaintiff or defendant named in said writ. I further certify that, after due search and diligent inquiry, I have been unable to find any property belonging to the within named defendant, in Alameda County, not exempt from execution, out of which to make the money judgment in said writ, or

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any part thereof, and I herewith return said writ without further service, wholly unsatisfied.

Dated,, 18...

., Sheriff,

By, Deputy Sheriff.

§ 821. **Return on Writ of Assistance.**

(The same form of return may be used as in writ of restitution, Secs. 819-820, *ante*. There is no money judgment required to be made by the writ of assistance, and no return required except as to putting plaintiff in possession.)

§ 821a. **Return on Writ of Certiorari.**

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within writ on the day of, 18.., and served the same on the day of, 18.., by delivering to and leaving with Hezekiah Lorgs, personally, in County, a copy of the within writ.

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$....

§ 822. **Search Warrant.** (See Secs. 735-741.)

County of , }
. . . . Township. } ss.

The People of the State of to any sheriff, constable, marshal, or policeman in the County of :
Proof, by affidavit, having been this day made before

me by (naming every person whose affidavit has been taken), that (stating the grounds of the application), you are therefore commanded, in the daytime (or at any time of the day or night, as the case may be), to make immediate search on the person of C. D. (or in the house situated, describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property: (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).

Given under my hand, and dated this day of A. D. 18...

E. F., Justice of the Peace (or as the case may be).

§ 823. **Return on Search Warrant.** (*California.*)

County of, }
 Township. } ss.

I hereby certify that I have served the within warrant, and have the property described therein in the place designated, in the possession of, and having cause to believe that said stole said property, I have arrested him, and have him with the goods here in court.

Dated,, 18...

., Constable.

§ 824. **Affidavit to Inventory with Search Warrant.** (*California.*) See Sec. 1537 C. C. P.

County of, }
 Township. } ss.

I,, the officer by whom the warrant was executed, do swear that the above inventory contains

§§ 825, 826 SHERIFFS' AND CONSTABLES' FORMS.

a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn to before me, }
this day of, 18... }
.....

§ 825. **Return on Citation.**

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify that I served the within citation on the within named, by delivering to, personally, a copy thereof, on the day of, A. D. 18.., at said county.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.....

§ 826. **Return on Service of Injunction on Individual.**

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the annexed order of injunction on the day of, 18.., and personally served the same on the day of, 18.., upon Silas Snooks, defendant, by delivering to said Silas Snooks, personally, in the County of Alameda, a copy of said order of injunction and of the summons, and a copy of the verified complaint in said action therein named.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.....

§ 827. **Return on Injunction against County and Supervisors.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the annexed writ of injunction on the day of, 18.., and duly served the same on said day of, 18.., by personally delivering to and leaving with each of the following named persons, as members of the Board of Supervisors of the County of, in the said County of, on said day, a copy of said writ of injunction attached to a copy of the complaint mentioned in said writ of injunction, which said copy of the complaint had attached to it the verification to the original complaint: (insert names of persons served). And I further certify that, at the time of said service, said persons were members of the Board of Supervisors of the County of, the defendant named in said writ of injunction and complaint, and that said persons were so served as members of said board.

And I further certify that I served the said writ of injunction on the defendant, "The County of . . .," on the day of, 18.., by personally delivering to and leaving with, president of the Board of Supervisors of said County of, a copy of said writ of injunction attached to a copy of the complaint mentioned in said writ of injunction, which said copy of the complaint had attached to it a copy of the verification to the original complaint.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.....

§ 828. Return on Habeas Corpus—Prisoner in Custody.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby return to the Honorable Judge of the Superior Court of County, that before the coming to me of the within writ, the said Petroleum V. Nasby was committed to my custody, and that he now is detained by virtue of a commitment, a copy of which is hereto annexed, the original of which I also herewith produce; nevertheless I have the body of the said Petroleum V. Nasby before you at the time and place within mentioned, as I am within commanded.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

§ 829. Return on Habeas Corpus—Prisoner Released on Bail.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, in obedience to the order contained in the within writ, do hereby return to the Honorable Court of the County of, State of, that before the coming to me of the said writ, the said was committed to my custody by virtue of a commitment, a copy of which is hereto annexed, the original of which I also produce; and that said has been allowed to go upon bail approved by a judge of the Court of

the County of . . . in said State, the bail bond whereof is filed with the clerk of said Court.

Dated, . . . , 18...

. . . , Sheriff.

By . . . , Deputy Sheriff.

§ 830. Return on Habeas Corpus—Prisoner Held on Oral Charge.

Sheriff's Office, }
County of . . . } ss.

I, . . . , Sheriff of the County of . . . , hereby certify and make return to the writ of *habeas corpus* in the matter of the application of . . . in the . . . Court of the County of . . . , as follows, to wit: That on the . . . day of . . . , 18.., I received into my custody the said . . . , and he was so placed in my charge and custody by one . . . , Constable of . . . Township, of the County of . . . , and on the said receipt of said . . . and the placing of said . . . into my custody by said . . . , he, the said . . . , placed a charge and charged said . . . with the crime of . . . , and under and by virtue of said charge so preferred by said . . . , and by the law in such cases made and provided, and by no other warrant or process, I hold said . . . in my custody.

Dated, . . . , 18...

. . . , Sheriff.

By . . . , Deputy Sheriff.

§ 831. Return on Habeas Corpus—Prisoner Held on Judgment Pending Appeal.

Sheriff's Office, }
County of . . . } ss.

I, . . . , Sheriff of the County of . . . , do

hereby return to the Honorable, Judge of the Court, that before the coming to me of the within writ, the said was committed to my custody, and is detained, by virtue of an order made by the Honorable, Judge of the Court of County, a certified copy of which is hereto annexed; and that said is held in my custody under and by virtue of a judgment in the case of the People of the State of against, in the Court of the County of, a certified copy of which judgment I herewith produce; and that said is also detained by me by virtue of a certificate of probable cause, made by the Honorable, Judge of the Court of the State of, and dated, 18.., for the appeal prosecuted by said to the Supreme Court of the State of, a copy of which certificate is hereto annexed:

Nevertheless, I have the body of the said before you at the time and place within mentioned, as I am within commanded.

Dated,, 18..

., Sheriff.

By, Deputy Sheriff.

§ 832. Return on Habeas Corpus—Prisoner Held by U. S. Court.

Sheriff's Office, }
County of } ss.

To the Honorable Court of the County of, State of:

In return to the writ of *habeas corpus* issued to me, commanding me to produce before your Honorable Court the body of, now in my custody, I hereby

produce and return to you a certified copy of an order of the Court of the United States for the District of, made on the day of, 18.., by which order the said was ordered to be imprisoned in the County Jail of County,, and under which he was committed to my custody on the day of 18.., by the United States Marshal for the said District of, and by virtue of which order I now hold said I further certify that I also hold said in my custody in obedience to two certain further orders of said Court, certified copies of which I also herewith produce, marked respectively "Order to Show Cause and Restraining Order," and "Certified Copy of Order."

I return said certified copies of said orders as a sufficient return to said writ and all that I am authorized to return by law. (See *Abelman vs. Booth*, 21 *Howard*, U. S. 506, and *Tarble's Case*, 13 *Wallace*, U. S. 397.) So answers:

Dated,, 18..

., Sheriff.

By, Deputy Sheriff.

§ 833. Return on Warrant of Arrest.

Sheriff's Office, }
County of } ss.

I hereby certify that I received the within warrant on the day of, 18.., and served the same by arresting the within named defendant on the day of, 18.., and bringing him into court this day of, 18..

., Sheriff.

By, Deputy Sheriff.

§ 834. Return on Warrant—Defendant Released on Bail.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I have served the within warrant by arresting the within named defendant,, on the day of, 18...; and said defendant having given the required bail, in the sum of dollars, with and as sureties, and said bail having been approved by the Honorable, Judge of the Court of the County of, I have released said defendant from custody.

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

§ 835. Certificate of Surrender of Prisoner by Bondsmen.

Sheriff's Office, }
County of } ss.

....., one of the sureties upon the bail bond of, charged (state charge against prisoner), having delivered to me a certified copy of the bail bond of, together with his statement in writing, surrendering said, and I, having thereupon taken in custody the said, whom I now hold, I do now certify and by this certificate acknowledge that said has surrendered the said, and that said is now in my custody.

Dated, 18...

....., Sheriff.

By, Deputy Sheriff.

§ 836. Return on Order of Arrest—Prisoner Discharged on Habeas Corpus and Bail Given.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the within annexed certified copy of Order and Judgment on the day of, 18.., and served the same by arresting the therein named on said day of, 18.., and taking him into my custody; and that I held and detained him in my custody under said order and judgment, until he was, in due form of law, removed from my custody by writ of *habeas corpus*, on said day of, 18.., granted by Honorable, Associate Justice of the Supreme Court of the State of, and was then and there discharged from such arrest, by an order contained in said writ admitting said to bail in the sum of dollars.

Dated,, 18..

., Sheriff.

By, Deputy Sheriff.

§ 837. Return on Order of Arrest—Arrest and Bail in Justice's Court. (California.)

County of, }
. . . . Township. } ss.

I hereby hereby certify that I have served the above order, by arresting and bringing into court the said, this day of, A. D. 18.., at o'clock . . m., and that I have notified the plaintiff thereof.

., Constable.

By, Deputy.

§ 838. **Return on Venire for Jurors.**

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within and hereunto annexed venire for jurors, on the day of, A. D. 18..., and by virtue of the same have personally summoned the hereinafter named persons to be and appear at the time and place therein named, to act as jurors. I also certify that they were summoned at the time and in the manner set opposite their respective names, viz.: by leaving with them personally, when they could be found, the notice required by statute, and when they could not be found, by leaving such notice at their respective places of residence with some person of suitable age.

Names.	Manner of Service.	Time of Service.	No. Miles.
.....

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

§ 839. **Return on Death Warrant.**

Sheriff's Office, }
County of Alameda. } ss.

I, Charles McCleverty, Sheriff of the County of Alameda, do hereby certify and return that I received the within warrant on the 3d day of January, A. D. 1884, and that, in compliance with three certain orders of reprieve, granted by the Honorable George Stoneman,

Governor of the State of California, and issued under the great seal of the State of California, and delivered to me, the execution of the within named Lloyd L. Majors, was postponed by me until the 23d day of May, A. D. 1884, on which said last named day, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of said day, to wit: between the hours of 11 and 12 o'clock of said day, in pursuance of said warrant and reprieves, said Lloyd L. Majors was executed by me, as such sheriff, by hanging by the neck until he was dead, in the jail yard of the jail of said County of Alameda; and that said execution was conducted in conformity to the provisions of law of this State concerning capital punishment, and of the sentence referred to in said warrant.

Dated at Oakland, this 24th day of May, A. D., 1884.

CHARLES McCLEVERTY, Sheriff.

§ 849. Return on Notice of Land Office Con-
test.

State of California, }
County of } ss.

....., being duly sworn, says that he is acquainted with, named within, in the contest of *vs.*; that he served the notice of contest herein on said at, on day, the day of, A. D. 18.., by handing to and leaving with said a true copy of the said notice of contest herein.

Subscribed and sworn to before }
me this day of, 18... }
.....

§§ 841, 842 SHERIFFS' AND CONSTABLES' FORMS.

§ 841. **Order for Attachment of Personal Property.** (*California.*)

In the Court of the County of, State
of

.....)
vs.)
.....)

To, Sheriff of County:

You are hereby instructed to attach, by virtue of the
accompanying writ, in the above entitled suit, the fol-
lowing described property, and place a keeper in charge
at plaintiff's expense, viz.: (description).

Dated,, 18...

.....,
Attorney for Plaintiff.

§ 842. **Sheriff's Notice of Garnishment.** (*Cal-
ifornia.*)

Sheriff's Office,)
County of ...) ss.

To Mr.:

You will please take notice that all moneys, goods,
credits, effects, debts due or owing, or any personal
property in your possession or under your control,
belonging to the within defendant..., or either of
them, are attached by virtue of a writ of which this is
a copy, and you are notified not to pay over or transfer
the same to anyone but the Sheriff of County, or
someone legally authorized to receive the same, but
conduct yourself in accordance with the statutes in such
case made and provided. I also require of you a state-
ment in writing of the amount of the same.

Dated,, 18...

....., Sheriff,

By, Deputy Sheriff

§ 843. **Answer to Garnishment.** (*California.*)

In the Court of the County of, State
of

..... }
vs. }
..... }

To the notice of garnishment and demand for a statement served on me this day of, A. D. 18.., by the Sheriff of County, under and by virtue of an issued in the above entitled cause, my answer is, that I am indebted to, said defendant.., in the sum of dollars, and that I have in my possession and under my control personal property belonging to said defendant, to wit: (property).

(Signed)

Dated,, 18...

§ 844. **Sheriff's Inventory and Keeper's Receipt.** (*California.*)

..... }
vs. } Sheriff's Inventory.
..... }

By virtue of a writ of against the defendant in the above entitled cause, for \$...., with interest and costs, duly attested the day of, A. D. 18.., I have levied upon the following property upon the premises of, and in possession,, to wit: (description).

Dated,, 18...

....., Sheriff.

By, Deputy Sheriff.

The following is the keeper's indorsement on above form:—

KEEPER'S RECEIPT.

I hereby acknowledge that I have received the within described property so levied upon by the Sheriff of County, from said sheriff, and hereby promise and undertake to return the same, and every part thereof, to the said sheriff on demand.

Dated,, 18...

., Sheriff's Keeper.

§ 845. **Notice of Attachment of Stocks.** (*California.*)

Sheriff's Office, ()
County of ...)

To The Happy Clam Mining Company, and David Digger, Secretary of said Company:

You will please take notice that all stocks or shares, or interest in stocks or shares, of The Happy Clam Mining Company, in your possession or under your control, belonging to the within defendant, are attached by virtue of a writ, of which this is a copy, and you are notified not to transfer or deliver over the same to anyone but the Sheriff of County. I also require of you a statement in writing of the amount of the same.

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

§ 846. **Order for Attachment of Real Estate.**

In the Court of the County of, State
of

.....)
vs.)
.....)

To, Sheriff of County:

You are hereby instructed to attach, by virtue of the accompanying writ, in the above entitled suit, the following described property, standing on the records of County in the name of, to wit: (description).

Dated,, 18.

.....,
Attorney for Plaintiff.

§ 847. **Notice of Attachment of Real Property.** (*California.*)

[TO ATTACH TO COPY OF WRIT.]

State of,)
County of } ss.

Notice is hereby given that, under and by virtue of a writ of attachment, issued out of the Court of County, State of, of which the annexed is a true copy, I have this day attached all the right, title, claim and interest of, defendant., or either of them, of, in and to the following described real estate, standing on the records of County in the name of, and particularly described as follows: (description of property).

Dated,, 18...

....., Sheriff.
By, Deputy Sheriff.

§ 848. **Order for Release of Attachment.**

.....
vs.

To, Sheriff of County:

You are hereby directed and ordered to release all the property attached by you in the above entitled action, and return the writ of attachment to the court from which it was issued.

Dated,, 18...

.....,
 Plaintiff's Attorney.

§ 849. **Undertaking to Prevent Attachment.**
(California.)

In the Court of the County of, State of

.....
vs.

Whereas, the above named plaintiff has commenced an action in the aforesaid court, against the above named defendant, for the recovery of dollars,; and whereas, an attachment has been issued, directed to, Sheriff of the County of, and placed in his hands for execution, whereby he is commanded to attach and safely keep all the property of the said defendant within his county not exempt from execution, or so much thereof as might be sufficient to satisfy the plaintiff's demand therein stated, in conformity to the complaint, in the sum of dollars,, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy said demand, beside costs, in which case to take such undertaking;

And whereas, the said defendant is desirous of giving the undertaking mentioned in the said writ:

Now, therefore, we, the undersigned, residents of the . . . , in consideration of the premises and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of . . . dollars, and promise to the effect that if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment, together with the costs, not exceeding in all the said sum of . . . dollars.

Dated at . . . , the . . . day of . . . , 18...

..... [SEAL.]
 [SEAL.]

State of . . . ,
 County of . . . } ss.

. . . and . . . , whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself deposes and says: That he is a resident and . . . holder of the . . . , County of . . . , and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me, }
 this . . . day of . . . , A. D. 18... }

§ 850. Undertaking on Release of Attachment. (*California.*)

In the . . . Court of the County of . . . , State of . . .

 vs. }
 }

Whereas, the above named plaintiff.. commenced

an action in the Superior Court of the County of of the State of, against the above named defendant. . . claiming that there was due to said plaintiff. . from said defendant. . the sum of dollars, or thereabouts, and thereupon an attachment issued against the property of said defendant. . as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant. . have been attached and seized by the sheriff of said county, under and by virtue of said writ ;

And whereas, the said defendant. desirous of having said property released from attachment ;

Now, therefore, we, the undersigned, residents and holders in the County of, in consideration of the premises, and also in consideration of the release from said attachment of the property so attached, as above mentioned, do hereby jointly and severally undertake, in the sum of dollars, and promise that in case the plaintiff. . recover judgment in the action, defendant. . will, on demand, pay to plaintiff. . the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs, the same to be paid in United States gold coin, if so required by the terms of the judgment.

Dated at, the day of, 18...

.....
.....

(Insert affidavit of qualification of sureties as in preceding blank.)

§ 851. Indemnity Bond in Attachment.

KNOW ALL MEN BY THESE PRESENTS:

That we,, of the County of, as principal, and, of the said county, and, of the said

county, as sureties, are held and firmly bound unto, Sheriff of the County of, in the sum of dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated, the day of, A. D. 18. . . .

Whereas, under and by virtue of a writ of attachment issued out of the Court of the County of, of the State of, in the action of, plaintiff, against, defendant, directed and delivered to said, Sheriff of the County of, the said sheriff was commanded to attach and safely keep all the property of such defendant, within his said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, amounting to dollars, as therein alleged, and the said sheriff did thereupon attach the following described goods and chattels: (description of goods).

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, claimed the said goods and chattels as h. . . property.

And whereas, the said plaintiff hereby expressly waiving a trial by a sheriff's jury of the right of property, require of said sheriff that he shall retain said property under such attachment and in his custody.

Now therefore, the condition of this obligation is such that if the said, as principal, and and, as sureties, their heirs, executors and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators and assigns, of and from all and any damages, expenses,

costs and charges, including all counsel fees for which he, the said sheriff, his heirs, executors, administrators or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond; and against all loss and liability which he, the said sheriff, his heirs, executors, administrators or assigns, shall sustain or in any wise be put to, for or by reason of the attachment, seizing, levying, taking or retention by him, the said sheriff, in his custody, under said attachment of the property claimed as aforesaid.

And that it may be lawful for the said sheriff, his heirs, executors, administrators or assigns, to bring suit against the principal and sureties hereto, or either of them, or their or either of their executors, administrators or assigns, immediately upon the rendition of any judgment against the plaintiff in said cause or against the said sheriff, his heirs, executors, administrators or assigns. And that said sheriff shall not be required first to pay the said judgment in order to entitle him or his legal representatives to maintain such suit and recover judgment thereon—then the above obligation to be void, otherwise to remain in full force and virtue.

In case suit or suits at law or in equity, or any proceeding to be brought against the said . . . , sheriff, or against him individually, or against him in any capacity, jointly with other person or persons, or alone, for or on account of the property so levied upon, or for the conversion of the same, the said . . . shall and may select his own counsel to act in any such matter with the attorney or attorneys of the principal in this bond named, and the reasonable fees of such counsel shall be a charge against said principal and be secured by this bond. So likewise in case of suit or any event requiring the advice of counsel in and about the custody

or detention of said property, the said shall be at liberty to consult counsel of his own choice, and the reasonable fee of such counsel shall be secured by this bond. In addition, and as cumulative to remedy by suit against the sureties hereto, it is and shall be the right and privilege of the said, immediately upon the rendition of any judgment against the plaintiff in this cause or against the said, to apply in the court wherein such judgment was rendered, and upon filing this bond, to have judgment thereon rendered in his favor against the principal and sureties hereon for the full amount of any such judgment, including all costs, damages, expenses and counsel fees as the said may have incurred in the said action, as well as counsel fees for advice, and expense of keeping or storing property kept hereinunder. And the principal and sureties hereto expressly waive any notice of any such application, and consent to the entry of such judgment, consenting and stipulating also that the estimate of said as to the amount of expenses, counsel fees, storage and the like, shall be final, binding and conclusive. The remedies herein provided shall not exclude any other legal relief, but are cumulative to the other rights, legal and equitable, of said In case of any recovery against said growing out of the seizure or detention of the property herein mentioned, then in any proceeding by said, upon this bond, any defense based upon illegality of the consideration hereof, or the unlawfulness of the act or acts of said, as sheriff or otherwise, is hereby expressly waived.

Sealed and delivered in presence of }
 }

§ 852. **Order for Levy and Sale of Personal Property.**

In the Court of the County of, State of

.....
vs. }
.....

To, Sheriff of County:

You are hereby instructed to levy upon and sell, by virtue of the accompanying writ, in the above entitled suit, the following described personal property, belonging to the defendant herein: (description).

Dated,, 18...

.....,
Attorney for Plaintiff.

§ 853. **Indemnity Bond under Execution—
Personal Property Claimed by Third Party.**

KNOW ALL MEN BY THESE PRESENTS:

That we, of the County of, as principal, and, of the said county, and, of the said county,, as sureties, are held and firmly bound unto, Sheriff of the County of, in the sum of dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated,, the day of, A. D. 18...

Whereas, under and by virtue of a writ of execution,

issued out of the Court of the County of, of the State of, in the action of, plaintiff, against, defendant, directed and delivered to said, Sheriff of the County of, the said sheriff was commanded to satisfy the judgment, with interest, out of the personal property of such defendant within his county not exempt from execution, and if sufficient personal property could not be found, then out of the real property belonging to him on the day when the said judgment was docketed, or at any time subsequently, the said sheriff did thereupon levy upon and take into his possession the following described goods and chattels, to wit: (description of goods).

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, claimed the said goods and chattels as h. . . property;

And whereas, the said plaintiff hereby expressly waiving a trial by a sheriff's jury of the right of property, require of said sheriff that he shall retain said property, under such levy, and sell the same, and apply the proceeds thereof to the satisfaction of said judgment, interest and costs of suit;

Now, therefore, the condition of this obligation is such that if the said, as principal, and and, as sureties, their heirs, executors and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators and assigns, of and from all and any damages, expenses, costs and charges, including all counsel fees for which he, the said sheriff, his heirs, executors, administrators or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond, and against all loss and liability which he, the said

sheriff, his heirs, executors, administrators or assigns, shall sustain or in anywise be put to, for or by reason of the attachment, seizing, levying, taking, retention in his custody, or selling by him, the said sheriff, under said writ, of the property claimed as aforesaid.

And that it may be lawful for the said sheriff, his heirs, executors, administrators or assigns, to bring suit against the principal and sureties hereto, or either of them, or their or either of their executors, administrators or assigns, immediately upon the rendition of any judgment against the plaintiff in such cause, or against the said sheriff, his heirs, executors, administrators or assigns. And that said sheriff shall not be required first to pay the said judgment in order to entitle him or his legal representatives to maintain such suit and recover judgment thereon—then the above obligation to be void, otherwise to remain in full force and virtue.

In case suit or suits at law, or in equity, or any proceeding to be brought against the said, sheriff, or against him individually, or against him in any capacity, jointly with other person or persons, or alone, for or on account of the property so levied upon, or for the conversion of the same, the said shall and may select his own counsel to act in any such matter with the attorney or attorneys of the principal in this bond named, and the reasonable fees of such counsel shall be a charge against said principal and be secured by this bond. So, likewise, in case of suit or any event requiring the advice of counsel in and about the custody or detention of said property, the said shall be at liberty to consult counsel of his own choice, and the reasonable fee of such counsel shall be secured by this bond. In addition, and as cumulative to remedy

by suit against the sureties hereto, it is and shall be the right and privilege of the said, immediately upon the rendition of any judgment against the plaintiff in this cause, or against the said, to apply in the court wherein said judgment was rendered, and, upon filing this bond, to have judgment thereon rendered in his favor, against the principal and sureties hereon, for the full amount of any such judgment, including all costs, damages, expenses and counsel fees as the said may have incurred in the said action, as well as counsel fees for advice, and expense of keeping or storing property kept hereinunder. And the principal and sureties hereto expressly waive any notice of any such application and consent to the entry of such judgment, consenting and stipulating also that the estimate of said as to the amount of expenses, counsel fees, storage and the like, shall be final, binding and conclusive. The remedies herein provided shall not exclude any other legal relief, but are cumulative to the other rights, legal and equitable, of said In case of any recovery against said, growing out of the seizure or detention of the property herein mentioned, then, in any proceeding by said upon this bond, any defense based upon illegality of the consideration hereof, or the unlawfulness of the act or acts of said, as sheriff or otherwise, is hereby expressly waived.

Sealed and delivered in presence of

.

NOTE.—In cases where the right of the claimant to the property is tried before a sheriff's jury, the bond, instead of reciting that the plaintiff waives a trial, should state that "a jury was summoned by the said sheriff to try such claim, which said jury

§§ 854, 855 SHERIFFS' AND CONSTABLES' FORMS.

have, by their finding, decided," etc.; and if the verdict is in favor of the claimant, that "the said plaintiff, notwithstanding such finding, requires that said sheriff shall retain said property," etc.

§ 854. Notice of Sheriff's Sale of Personal Property. (*California.*)

Under and by virtue of an execution issued out of the Court of the County of, State of, and to me directed and delivered for a judgment rendered in said court, on the day of, A. D. 18..., in favor of, and against, for the sum of \$...., in, together with costs of suit and interest, I have levied on all the right, title, claim and interest of said defendant, of, in and to the following property, to wit: (description).

Notice is hereby given that on, the day of, A. D. 18..., at o'clock M., of said day, I will sell all the right, title and interest of said, or either of them, in and to the above described property, or so much thereof as may be necessary to satisfy plaintiff's claim, besides all costs, interest and accruing costs.

The sale will take place at, at public auction, for cash in hand, to the highest and best bidder.

Dated,, 18...

....., Sheriff.

By Deputy Sheriff.

§ 855. Certificate of Sale of Personal Property.

I,, Sheriff of the County of, State of, do hereby certify that, under and by virtue of an execution issued out of the Court of the said

County of in a certain action lately pending in said court, at the suit of, plaintiff, against, defendant, attested the day of, 18.., by which I was commanded to make the sum of dollars, with interest and costs, to satisfy the judgment in said action out of the personal property of said defendant if sufficient personal property could be found, all as more fully appears by the said writ, reference thereunto being hereby made; I have levied on, and on the day of, 18.., at .. o'clock, A. M., at the Court House door in the City of, in said County of, duly sold at public auction, according to law, and after due and legal notice, to, who made the highest bid therefor at such sale, for the sum of \$. . . . in coin, which was the whole price paid therefor, all the right, title and interest of the said judgment debtor,, in and to the following described personal property, to wit: (description of property).

Dated, this day of, 18..

....., Sheriff.

By Deputy Sheriff.

§ 855a. **Certificate of Sale of Corporate Stock.**

I,, Sheriff of the County of, State of, do hereby certify that, under and by virtue of the final judgment and decree of the Court of the County of, State of, in a certain action lately pending in said court, at the suit of, plaintiff, and against defendant, duly certified to me under the seal of said Superior Court on the day of, 18.., and to me, as such sheriff, duly directed and delivered, whereby I was commanded to sell the

hereunto annexed certificate of stock according to law, and apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of \$...., in United States gold coin, with interest and costs of suit; on the day of, 18.., at o'clock, .. M., at the Court House door, in the said County of, I duly sold at public auction, according to law, and after due and legal notice, to, who made the highest bid therefor, at such sale, for the sum of \$...., in United States gold coin, which was the whole price paid for, the hereunto annexed certificate of stock in said order of sale described.

Given under my hand, this day of, 18...
, Sheriff.

By, Deputy Sheriff.

§ 856. Order for Levy and Sale of Real Estate.

In the Court of the County of, State of

..... }
vs. }
 }

To, Sheriff of County:

You are hereby instructed to levy upon and sell, by virtue of the accompanying writ, in the above entitled suit, the following described property, standing on the records of County in the name of (description).

.....,
 Attorney for Plaintiff.

Dated, 18...

§ 857. Notice of Levy on Real Estate under Execution. (*California.*)

[TO ATTACH TO COPY OF WRIT.]

Sheriff's Office, }
County of } ss.

Notice is hereby given that, under and by virtue of a writ of execution, issued out of the Court of the County of, State of, of which the annexed writ is a true copy, I have this day attached and levied upon all the right, title, claim and interest of, defendant., or either of them, of, in and to the following described real estate, standing on the records of County in the name of, and particularly described as follows: (description of property).

....., Sheriff.

By, Deputy Sheriff.

Dated,, 18...

§ 858. Notice of Sale of Real Estate under Execution. (*California.*)

..... }
vs. } No. ... Sheriff's Sale.
..... }

By virtue of an execution issued out of the Court of the County of, State of, wherein, plaintiff, and, defendant, upon a judgment rendered the day of, A. D. 18.., for the sum of dollars, United States gold coin, besides costs and interest, I have this day levied upon all the right, title, claim and interest of said defendant,, of, in and to the following described real estate to wit: (description).

Public notice is hereby given that I will, on, the day of, A. D. 18.., at . . . o'clock .. M. of said day, in front of the Court House door of the County of, sell at public auction, for United States gold coin, all the right, title, claim and interest of said defendant,, of, in and to the above described property, or so much thereof as may be necessary to raise sufficient money to satisfy said judgment, with interest and costs, etc., to the highest and best bidder.

Dated, 18...

., Sheriff.

By, Deputy Sheriff.

§ 859. **Notice of Foreclosure Sale by Sheriff.**

.....
vs. } No. ... Sheriff's Sale.
 }

Under and by virtue of an order of sale and decree of foreclosure and sale, issued out of the Court of the County of, of the State of, on the . . . day of, A. D. 18.., in the above entitled action, wherein, the above named plaintiff, obtained a judgment and decree of foreclosure and sale against, defendant, on the . . . day of, A. D. 18.., for the sum of dollars, in United States gold coin, besides interest, costs and counsel fees, which said decree was, on the . . . day of, A. D. 18.., recorded in judgment book . . . of said court, at page . . ., I am commanded to sell th.. certain lot, piece or parcel of land, situate, lying and being in County of, State of, and bounded and described as follows: (description).

Public notice is hereby given that, on, the ...

day of, A. D. 18.., at . . . o'clock . . M. of that day, in front of the Court House door of the County of, I will, in obedience to said order of sale and decree of foreclosure and sale, sell the above described property, or so much thereof as may be necessary to satisfy said judgment, with interest and costs, etc., to the highest and best bidder, for gold coin of the United States.

Dated,, 18...

., Sheriff.

By, Deputy Sheriff.

§ 860. **Notice of Sale by Commissioner.** (*California.*)

..... }
 vs. } No. Commissioner's Sale.
 }

Under and by virtue of a judgment and decree of foreclosure and an order of sale issued out of the Court of the County of, State of California, on the day of, A. D. 18.., in the above entitled action, wherein, the above named plaintiff, obtained a judgment and decree of foreclosure and sale against defendant, on the day of, A. D. 18.., for the sum of dollars in gold coin of the United States, besides interest, costs and counsel fees, which said decree was, on the day of, A. D. 18.., recorded in judgment book of said court, at page, I am commanded to sell: (description of property.)

Public notice is hereby given that on, the day of, A. D. 18.., at o'clock . . M. of that day, in front of the Court House door of the County of, I will, in obedience to said judgment, decree

and order of sale, sell the above described property, or so much thereof as may be necessary to raise sufficient money to satisfy said judgment and decree, with interest and costs, etc., to the highest and best bidder, for gold coin of the United States.

Dated,, 18...

., a Commissioner
appointed by said Court.

§ 861. **Certificate of Execution Sale of Real Estate.** (*California.*)

In the Court of the County of,
State of

.)
vs.)
.)

I,, Sheriff of the County of, do hereby certify that by virtue of an execution in the above entitled case, attested the day of, 18.., by which I was commanded to make the amount of dollars, to satisfy the judgment in said action, with costs and interest thereon, out of the personal property of, the above defendant.., and if sufficient personal property could not be found, then out of the real property belonging to the said, on the day of, A. D. 18.., or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears; I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to, who was the highest bidder, for the sum of dollars,, which was the whole price paid by him for the right, title and interest of said defendant.., of, in and to the real estate described as follows, to wit: (description).

That the price of each distinct lot and parcel was as follows: . . . , Lot B, in Block 2, was sold to . . . for \$50, lawful money of the United States. Lot C, in Block 4, was sold to . . . for \$70, lawful money of the United States.

And that the said real estate is subject to redemption, in . . . , pursuant to the statute in such cases made and provided.

Dated at . . . , this . . . day of . . . , A. D. 18 . . .

., Sheriff,

By, Deputy Sheriff.

§ 862. **Certificate of Sale under Foreclosure.**

I,, Sheriff of the County of, State of, do hereby certify that, under and by virtue of the final judgment and decree of the Court of the County of , of the State of , in a certain action lately pending in said Court, at the suit of , plaintiff., and against , defendant, duly certified to me under the seal of said Court, the day of , A. D. 18 . . . , and an order of sale thereon, issued to me as such sheriff, duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of dollars, in United States gold coin, with interest, counsel fees, taxes and costs of suit, amounting in all to the sum of dollars on the day of , A. D. 18 . . . , at . . . o'clock, . . M., at the Court House door, in the City of , in the said county of , I duly sold at public auction, according to law, and after due and legal notice, to , who made the

highest bid therefor at such sale, for the sum of dollars, in United States gold coin,, which was the whole price paid, the real estate in said order of sale described, as follows, to wit: (description of property sold).

And I do hereby further certify that the said property was sold in lots or parcels, as follows: Lot 1 in Block 5 was sold to for \$1,000, United States gold coin. Lot 2 in Block 5 was sold to for \$800, United States gold coin. That the said sum of dollars, in United States gold coin, was the highest bid made, and the whole price paid therefor.

And that the same is subject to redemption, in United States gold coin, pursuant to the statute in such cases made and provided.

Dated at, this day of, A. D. 18 . . .

., Sheriff,

By, Deputy Sheriff.

§ 863. **Certificate of Redemption of Real Estate.**

State of }
County of } ss.

I,, Sheriff of the County of, State of, do hereby certify that on the day of, 18 . . ., Mary Juksch, judgment debtor under the judgment in the action hereinafter mentioned, in due form of law, tendered and paid to me the sum of \$188, being in full payment of the purchase price paid by the purchaser at the sale of the real property hereinafter described, made by me on the day of, 18 . . ., under the decree of foreclosure and sale, issued to me out of the Superior Court of the City and County of

San Francisco, State of California (No. 22764), in the action of *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle vs. The Berkeley Land and Town Improvement Association, Mary Jucksch, et als.*, including two per cent per month interest thereon, up to the time of redemption, together with the amount of all taxes and assessments paid by the purchaser on said property, after said purchase, and interest thereon. That, thereupon, I received said sum of money so tendered and paid as aforesaid, and have granted and executed to said Mary Jucksch this, my certificate of redemption of said property, in conformity with the statute in such case made and provided. The premises so redeemed, or intended to be redeemed, are described as follows, to wit: (description).

In witness whereof, I have hereunto set my hand this day of, 18...

., Sheriff.

By, Deputy Sheriff.

§ 864. Receipts to Sheriff.

\$ Oakland,, 18...

Received from Charles McCleverty, Sheriff of Alameda County,, in United States gold coin, being the amount of sale of real estate in the case of, Superior Court, County of, after deducting sheriff's costs and disbursements, amounting to \$

.

Plaintiff's Attorney.

\$ Oakland,, 18...

Received from Charles McCleverty, Sheriff of Alameda County,₁₀₀ dollars, in United States gold

coin, being the amount of judgment, interest, costs, etc., due plaintiff,, in the case of *vs.*, Superior Court, County of

.,
Plaintiff's Attorney.

§ 865. **Deed under Execution Sale.** (*California.*)

THIS INDENTURE, made this day of, A. D. 18.., between, Sheriff of the County of, of the first part, and, of the County of, and State of, of the second part:—

Whereas, by virtue of a writ of execution issued out of, and under the seal of, the Court of the County of, State of, attested the day of, A. D. 18.., upon a judgment recovered in said court on the day of, A. D. 18.., in favor of, and against, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements and real property belonging to him on the day of, A. D. 18.., or at any time afterwards;

And, whereas, because sufficient personal property of the said judgment debtor could not be found, whereof he, the said sheriff, could cause to be made the moneys specified in said writ, he, the said sheriff, did, in obedience to said command, levy on, take and seize all the estate, right, title and interest which the said judgment debtor so had of, in and to the lands, tenements, real

estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the day of, A. D. 18.., sell the said premises, at public auction, at the Court House door, in the City of, County of, between the hours of nine in the morning and five in the afternoon of that day, namely: at o'clock .. M., after first having given notice of the time and place of such sale, by advertising the same according to law; at which sale the said premises were struck off and sold to, for the sum of, United States gold coin, he, the said, being the highest bidder, and that being the highest sum bid, and the whole price paid for the same;

And, whereas, the said sheriff, after receiving from said purchaser the said sum of money so bid as aforesaid, gave to him such certificate as is by law directed to be given, and filed in the office of the recorder of the County of a duplicate of such certificate;

And, whereas, six months after such sale have expired without any redemption of the said premises having been made;

Now this indenture witnesseth, that I,, the sheriff aforesaid, and party hereto of the first part, by virtue of said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of money above mentioned, to him in hand paid, as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said, his heirs and assigns, all the estate, right, title and interest of the said, which had on the said day of, A. D. 18.., or at any time afterwards, or now of, in and to all

the following described premises, viz.: (description), together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the said above mentioned and described premises, with the appurtenances, unto the said, heirs and assigns forever, as fully and absolutely as he, the sheriff aforesaid, can, may or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof, the said sheriff, the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered in the)
 presence of)
) Sheriff of the County of
, State of

§ 866. **Sheriff's Deed under Foreclosure Sale.**
(California.)

THIS INDENTURE, made the day of, in the year of our Lord one thousand eight hundred and, between, Sheriff of the County of, State of, the party of the first part, and, the part . . . of the second part, witnesseth:

Whereas, in and by a certain judgment or decree, made and entered by the Court of the County of, State of, on the day of A. D. 18 . . ., in a certain action then pending in said court, wherein was plaintiff, and was defendant, and of which said judgment or decree a certified copy, with an order of sale from said court, was delivered to said party of the first part, as such sheriff, for execution, it was among other things ordered, ad-

judged and decreed, that all and singular the mortgaged premises described in the complaint in said action, and specifically described in said judgment or decree, should be sold at public auction by the sheriff of the said County of, in the manner required by law, and according to the course and practice of said court; that such sale be made, in the said County of, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon on such day as the said sheriff should appoint, that any of the parties to said action might become the purchaser at such sale; and that said sheriff should execute the usual certificates and deeds to the purchaser or purchasers, as required by law;

And, whereas, the said sheriff did at the hour of o'clock . . M., on the day of, A. D. 18 . ., after due public notice had been given, as required by the laws of this State, and the course and practice of said court, duly sell at public auction in the said County of, agreeably to said judgment or decree, and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereinafter described, were fairly struck off to the said, the said part . . hereto of the second part, for the sum of dollars, being the highest bidder, and that being the highest sum bid for the same;

And, whereas, the said thereupon paid to the said sheriff the sum of money so bid by;

And, whereas, the said sheriff thereupon made and issued the usual certificate in duplicate of the said sale in due form of law, and delivered one thereof to the said purchaser,, and caused the other to be filed in the office of the County Recorder of said County of;

And, whereas, more than six months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, the said . . . , or by or on behalf of any other person, . . . (recital of any assignment that may have been made).

Now this indenture witnesseth: That the said party of the first part, the said sheriff, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said judgment or decree, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of . . . dollars, . . . so bid and paid to him by the said purchaser, . . . , the said . . . , the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said part. . of the second part, and to . . . heirs and assigns forever, all th. . certain lot. . , piece. . or parcel. . of land situate, lying, and being in the said County of . . . , State of . . . , and bounded and particularly described as follows, to wit: . . . (description). Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and of said defendant, . . . , of, in and to the said premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises hereby conveyed, or intended so to be, together with the appurtenances, unto the said part. . of the

second part, heirs and assigns, to own proper use, benefit and behoof forever.

In witness whereof, the said party of the first part to these presents, has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of
 } Sheriff of the County of
, State of

§ 867. **Bond of Receiver in Insolvency.**
(California.)

In the Court of the County of, State of

In the Matter of the Estate of

 An Insolvent Debtor.

KNOW ALL MEN BY THESE PRESENTS:

That we,, as principal, and and as sureties, all of the County of and State of, are held and firmly bound unto the State of, in the following penal sums, to wit: The said, as principal, in the sum of dollars, as surety, in the sum of dollars, and as surety, in the sum of dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Dated this day of, A. D. 18...

The condition of the above obligation is such that, whereas said was, on the day of, A. D. 18.., by an order of the said Superior Court, duly made and entered herein, appointed receiver in the matter of the estate of, insolvent debtor:

Now, therefore, if the said shall well and truly perform, according to law, the duties of a receiver as aforesaid, during his incumbency of said office, and shall faithfully discharge all duties which may be required of him by any law enacted subsequently to the execution of this bond, then this obligation is to be void and of no effect, otherwise to remain in full force and effect.

..... [SEAL.]

..... [SEAL.]

(Insert affidavit of qualification of sureties as in Section)

State of,)
County of,) ss.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of, and that I will faithfully discharge the duties of a receiver in the above entitled matter.

Subscribed and sworn to before me,)
this day of 18..)

.....

§ 868. **Notice of Receiver's Sale in Insolvency.** (*California.*)

Notice is hereby given that the undersigned, receiver of the estate of, an insolvent debtor, will, on, the day of, 18.., at the hour of o'clock . . . M., in pursuance of an order of the Court of

the State of, in and for the County of, made on the day of, 18.., in the matter of . . ., an insolvent debtor, sell at public auction, to the highest and best bidder, for cash, at, County of, State of, the following described property, to wit: (description of property).

Dated, 18..

.....
Receiver.

.....
Attorney for Receiver.

§ 869. **Notice of Creditors' Meeting after Assignment by Debtor.** (*California.*)

Sheriff's Office, }
County of } ss.

.....,, 18..

Notice is hereby given that a meeting of the creditors of will be held at my office, in the City of, County of, State of, on day, the day of, 18.., at o'clock, .. M., for the purpose of electing one or more assignees in my place and stead as assignee of said, for the benefit of creditors.

Dated,, 18..

.....
Sheriff of the County of

§ 870. **Assignment by Sheriff for Benefit of Creditors.** (*California.*)

This indenture made this day of 18.., by and between, Sheriff of the County of, State of California, as such sheriff, and witnesseth;

That, whereas, on the day of, 18..,, in pursuance of the provisions of Division IV, Title 3, Part 2, of the Civil Code of California, did assign to said sheriff his property for the benefit of his creditors, which assignment was in writing and was duly recorded in the office of the County Recorder of said County on the day of, 18..;

And, whereas, the sheriff did thereupon cause a notice of a meeting of the creditors of said to be sent by mail to each creditor named, and to the address given in said assignment, and which specified the amount owing to such creditor, as set forth in said assignment, and notified them to meet at his office in, County of, State of, on day, the day of, 18.., at o'clock .. M. of that day, for the purpose of electing an assignee or assignees, in his place and stead, as assignee of the property of said

And, whereas, said sheriff did cause a notice of said meeting of creditors to be published for one time in the, a newspaper published in said County, which county was and is the place of residence of said

And, whereas, at the meeting of the creditors of said, held in pursuance of the aforesaid notices, which were given and published as required by law in such cases made and provided, the said, by a majority, in amount of the demands against the said, present and represented by proxy, was duly elected assignee in accordance with the aforesaid provisions of the said Civil Code;

Now, therefore, in consideration of the premises, and in pursuance of the law in such cases made and provided, I, ..., Sheriff as aforesaid, do, as such sheriff,

hereby convey, assign and set over to said, as such assignee, and to his successors and assigns, upon the trusts provided in said title, all and singular the property of every kind and description so as aforesaid assigned to me by the said

In witness whereof, I have hereunto set my hand and seal this day of, 18...

Signed, sealed and delivered }
in the presence of }
....., } Sheriff of the County of
....., State of

§ 871. Application for Requisition.

To His Excellency, Hon., Governor of the
State of

The undersigned respectfully makes this his application for a requisition upon the Governor of the State of for the person of, a fugitive from justice from this State, whose alleged crime is set out in the affidavit and warrant accompanying this application, and requests the appointment by your excellency of as a suitable person to receive and bring back to this State said fugitive from justice.

Dated,, 18...

• • • • •

§ 872. Affidavit for Requisition.

In the Justice's Court of Township, County of
. . . ., State of

The People of the State of }
vs. }
 }

State of , } ss.
County of }

....., being duly sworn, deposes and says: That

.... stands charged in the Court of Township, County of, State of, with having, on the day of, 18.., committed the crime of; that a complaint is on file in said court charging said with the commission of said crime, upon which complaint a warrant has been duly issued by the justice of said court for the arrest of said; that said is not now in this State, but has fled to the State of and is now, as this affiant is informed and believes, in the City of, in said State of, and is a fugitive from justice.

Subscribed and sworn to before me }
 this day of, 18... }

§ 873. **Trial Jury Summons.** (*California.*)

Sheriff's Office,, }
, 18... }

MR.

Sir: Having been regularly drawn as such, you are hereby summoned to attend the Superior Court, Department No., of County, at the Court House, in the City of, in said county, on, the day of, A. D. 18.., at o'clock .. M. of that day, then and there to serve as a trial juror for the session of said court.

Herein fail not, under penalty of the law.

....., Sheriff,

By, Deputy Sheriff.

§ 874. **Special Jury Summons.** (*California.*)

Sheriff's Office, ,
 , 18. . . .)

MR.

Sir: You are hereby summoned to attend the Superior Court, Department No. . . . , of County, at the Court House, in the City of . . . , in said county, on . . . , the . . . day of . . . , A. D. 18. . , at . . . o'clock . . M. of that day, then and there to serve as a trial juror for the . . . session of said court.

Herein fail not, under penalty of the law.

., Sheriff.

By, Deputy Sheriff.

§ 875. **Grand Jury Summons.** (*California.*)

Sheriff's Office, ,
 , 18. . . .)

MR.

Sir: Having been regularly drawn as such, you are hereby summoned to be and appear in the court room of Department of the Superior Court of the County of . . . , in the Court House of said county, on . . . day, the . . . day of . . . , A. D. 18. . , then and there to serve as a grand juror.

Herein fail not, under penalty of the law.

., Sheriff.

By, Deputy Sheriff.

§ 876. **Monthly Statement of Fees to Auditor.**
(*California.*)

Sheriff's Office,)
 County of) ss.

I,, Sheriff of said county, hereby certify that

the total amount of fees due from me to the county treasury of said county, for the month of . . . , 18 . . , as shown by the fee book in my office, is . . . dollars (\$. . . ₁₀₀).

., Sheriff.

By, Deputy Sheriff.

State of , }
County of } ss.

I,, do swear that the fee book in my office contains a true statement, in detail, of all fees and compensation of every kind and nature, for official services rendered by me, my deputies and assistants, for the month of , A. D. 18 . . , and that said fee book shows the full amount received or chargeable in said month and since my last monthly payment; and neither myself, nor, to my knowledge or belief, any of my deputies or assistants, have rendered any official service, except for the county, which is not fully set out in said fee book, and that the foregoing statement thereof is true and correct.

Subscribed and sworn to before me, }
this . . . day of . . . , 18 . . }
.
.

§ 877. **Semi-Annual Statement of Fees to Auditor.** (*California.*)

Sheriff's Office, }
County of } ss.

I hereby certify that the amount of fees earned, collected or chargeable by me, as , for the six months ending , 18 . . , is . . . dollars (\$. . .).

Witness my hand this . . . day of . . . , 18 . .
., Sheriff.

State of , }
 County of } ss.

I, , Sheriff of the County of , do swear
 that the foregoing statement is true and correct.

Subscribed and sworn to before me, }
 this day of , 18... }

.....

.....

§ 878. **Monthly Statement of Jailer to County Auditor.** (*California.*)

LIST OF PRISONERS CONFINED IN THE COUNTY JAIL OF
 COUNTY DURING THE MONTH OF , 18...

Names.	No. of Days.	Remarks.
.....

State of , }
 County of } ss.

I, , Sheriff of the County of , do swear
 that the foregoing statement is true and correct.

Subscribed and sworn to before me, }
 this day of , 18... }

.....

.....

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